

2021

## Conventional Protections for Commercial Fan Art Under the U.S. Copyright Act

Rachel Morgan

Fordham University School of Law, [rmorgan20@fordham.edu](mailto:rmorgan20@fordham.edu)

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Rachel Morgan, *Conventional Protections for Commercial Fan Art Under the U.S. Copyright Act*, 31 Fordham Intell. Prop. Media & Ent. L.J. 514 (2021).  
Available at: <https://ir.lawnet.fordham.edu/iplj/vol31/iss2/4>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Conventional Protections for Commercial Fan Art Under the U.S. Copyright Act

### Cover Page Footnote

Rachel Morgan is a third-year student at Fordham University School of Law and a Senior Notes and Articles Editor for the Intellectual Property, Media, and Entertainment Law Journal. Prior to law school, she attended Dickinson College in Carlisle, Pennsylvania where she majored in History and Italian Studies. She wrote this Note as an independent study in the spring of her second year. The author would like to thank Professor Courtney Cox for her guidance and supervision throughout the Note-writing process, as well as her fellow Executive Board members on the journal for their help in editing and publishing this Note.

# Conventional Protections for Commercial Fan Art Under the U.S. Copyright Act

Rachel Morgan\*

*For many years, artists and consumers of pop culture have channeled their artistic skills into creating derivative works of their favorite fictional stories and characters. In the United States, fans of Japanese anime and manga have made a living selling artwork of their favorite characters at anime conventions, large gatherings that bring in fellow fans from all around the country. Despite the prevalence of this practice, there is a glaring legal issue: these fictional characters are the intellectual property of the authors who created them, and fan art is blatant copyright infringement. However, there are still many economic advantages to permitting the sale of fan art. This Note will propose a way to apply the fair use defense to commercial fan art in a way that protects the economic interests of both authors and fans.*

INTRODUCTION .....	516
I. THE WORLD OF FAN ART AND COPYRIGHT.....	521
A. Anime, Manga, and Convention Culture .....	521
B. Applicable Copyright Law .....	523

---

\* Rachel Morgan is a third-year student at Fordham University School of Law and a Senior Notes and Articles Editor for the Intellectual Property, Media, and Entertainment Law Journal. Prior to law school, she attended Dickinson College in Carlisle, Pennsylvania where she majored in History and Italian Studies. She wrote this Note as an independent study in the spring of her second year. The author would like to thank Professor Courtney Cox for her guidance and supervision throughout the Note-writing process, as well as her fellow Executive Board members on the journal for their help in editing and publishing this Note.

1. Basics of U.S. Copyright Law.....	523
2. Copyrightability of Characters .....	527
3. Art Styles as Indicative of Substantial Similarity .....	529
C. <i>The Fair Use Defense</i> .....	530
1. Purpose and Character.....	531
2. Nature of the Copyrighted Work.....	532
3. Amount and Substantiality .....	532
4. Effect on the Market.....	533
5. Fair Use and Fan Works so Far .....	534
D. <i>Japanese Copyright Law vs.         American Copyright Law</i> .....	536
II. THE LEGALITY OF FAN ART AND OTHER LEGAL DEBATES .....	538
A. <i>The Circuit Split Over the Importance of         Transformativeness</i> .....	539
B. <i>Legal Risks for Fan Artists and False         Feelings of Safety</i> .....	545
C. <i>Restraining Fan Artists' Creativity:Online         Attorneys' Advice</i> .....	549
D. <i>Anime Convention Policies</i> .....	551
E. <i>Academic Literature</i> .....	557
1. Amending the Copyright Act .....	559
2. Modifying Fair Use .....	560
3. The First Amendment Argument .....	562
III. HOW TO GIVE ARTISTS CLARITY ON COPYRIGHT	564
A. <i>The Inadequacy of Current Proposed         Solutions</i> .....	564
B. <i>Solution: Art Style as an Indication of         Transformativeness</i> .....	567
1. Purpose and Character.....	569
2. Nature of the Copyrighted Work.....	570
3. Amount and Substantiality .....	571
4. Effect on the Market.....	571
CONCLUSION.....	573

## INTRODUCTION

On April 6, 2019, longtime fans of Natsuki Takaya's romance series *Fruits Basket* gathered around their televisions and computers to watch the premiere of the franchise's latest television adaptation. The original *Fruits Basket* manga ("manga" being Japanese graphic novels)<sup>1</sup> is one of the most popular of its genre. More than eighteen million copies of *Fruits Basket* manga volumes have been sold in Japan.<sup>2</sup> Across the Pacific, the series' sixteenth volume reached the fifteenth position on USA Today's Top 150 Bestselling Books in 2007.<sup>3</sup> Since the first volume of *Fruits Basket* was published in 1998, the franchise has expanded to include a 2001 anime adaptation, a sequel series, a spin-off, and a second anime adaptation that premiered in April of 2019.<sup>4</sup>

The renewed interest in *Fruits Basket* also sparked a creative flame within its fans. These fans expressed their appreciation for Takaya's work by creating and sharing their own artistic renditions of *Fruits Basket*'s characters.<sup>5</sup> This type of artwork is called fan art: artwork that uses another artist's copyrighted—and usually famous—characters as the subject of the artistic piece.<sup>6</sup> For most fans of *Fruits Basket* and other popular culture, fan art is purely a means of expressing one's love for a series. Fan artists like Reddit user Blesseii, who drew their own rendition of *Fruits Basket*'s heroine Tohru Honda in September of 2019, will share their artwork

---

<sup>1</sup> See *Manga*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/manga> [<https://perma.cc/DB24-SRG6>].

<sup>2</sup> 'Fruits Basket' Tally Over 18 Million, ICv2 (May 7, 2007), <https://icv2.com/articles/comics/view/10537/fruits-> [[perma.cc/K5A3-LNKF](https://perma.cc/K5A3-LNKF)].

<sup>3</sup> *Id.*

<sup>4</sup> "Anime" is "a style of animation originating in Japan that is characterized by stark colorful graphics depicting vibrant characters in action-filled plots often with fantastic or futuristic themes." *Anime*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/anime> [[perma.cc/Q9GH-D73X](https://perma.cc/Q9GH-D73X)]; see also *Fruits Basket (Manga)*, FRUITS BASKET WIKI, [https://fruitsbasket.fandom.com/wiki/Fruits\\_Basket\\_\(Manga\)](https://fruitsbasket.fandom.com/wiki/Fruits_Basket_(Manga)) [[perma.cc/F3SE-KD7Z](https://perma.cc/F3SE-KD7Z)].

<sup>5</sup> Such fan art is easily accessible on websites such as Reddit and DeviantArt. See, e.g., *Fruits Basket*, REDDIT, <https://www.reddit.com/r/FruitsBasket/> [<https://perma.cc/2C6P-QWJE>]; Results for "Fruits Basket," DEVIANTART, <https://www.deviantart.com/> [<https://perma.cc/KRL6-WFJ4>] (Search on homepage for "Fruits Basket.").

<sup>6</sup> See Olga Perova, *Fan-art: Independent Art or Blind Copying?*, 14 YOUNG SCIENTIST USA 31, 31 (Oct. 2018).

on websites such as Reddit or DeviantArt for public viewing.<sup>7</sup> For the most part, these fan artists are motivated only by their desire to show others around the world how much they love a certain franchise, and have no desire to profit off their fan art.<sup>8</sup>

On the other hand, there are artists who do seek to profit off their fan art and will openly sell their artwork in public spaces to accomplish this goal. The most prevalent public settings in which fan artists sell their wares are anime conventions<sup>9</sup>. Similar to the famous San Diego Comic Con, anime conventions allow anime fans to gather and express their love for Japanese popular culture by wearing costumes, attending special events, and buying merchandise.<sup>10</sup> In November 2019, the author of this Note attended an anime convention in New York City, while there was still bustling excitement surrounding the new *Fruits Basket* anime. At the convention, fans were able to buy copies of the original manga and other official merchandise. They could even pose for pictures at a display recreating the main characters' kitchen. All of this was provided by Funimation, the company that currently owns the license to market *Fruits Basket* in the United States.<sup>11</sup> Also at this convention were countless

---

<sup>7</sup> See @Blesseii, *Tohru Honda*, REDDIT (Sept. 14, 2019), [https://www.reddit.com/r/FruitsBasket/comments/d4d5qt/tohru\\_honda\\_my\\_first\\_fanart\\_f\\_or\\_fruits\\_basket\\_i/](https://www.reddit.com/r/FruitsBasket/comments/d4d5qt/tohru_honda_my_first_fanart_f_or_fruits_basket_i/) [perma.cc/P8FB-98GV]; see also DEVIANTART, <https://www.deviantart.com/> [perma.cc/R6RL-P3M4].

<sup>8</sup> See, e.g., Christina Chung, *Holy Fandom Batman! Commercial Fan Works, Fair Use, and the Economics of Complements and Market Failure*, 19 B.U.J. SCI. & TECH. L. 367, 368 (2013); Katrina Monica C. Gaw, *Restoring Balance to the Force (of Fandom): An IP Management Strategy for Walking the Fine Line Between IP Protection and Fan Engagement*, 62 ATENEO L.J. 1483, 1493–94 (2018).

<sup>9</sup> See KIRISKA, 2014 ANIME CONVENTION ARTIST VENDOR SURVEY, [https://kiriska.com/misc/research/2014\\_artistalley\\_survey.pdf](https://kiriska.com/misc/research/2014_artistalley_survey.pdf) [https://perma.cc/C38P-V67Y] for a survey on the levels of income anime conventions attribute to the sale of fan art.

<sup>10</sup> See generally *Things to Do at AX, ANIMEEXPO*, <https://www.anime-expo.org/plan/activities/> [https://perma.cc/9WJB-NATY] (providing a general description of the events commonly available at anime conventions).

<sup>11</sup> See Results for “Fruits Basket” in Shows & Shop, FUNIMATION, <https://www.funimation.com> [https://perma.cc/DF97-NSWD] (Search on homepage for “Fruits Basket.”). The series is also available through Crunchyroll, which is in a partnership with Funimation. See Results for “Fruits Basket,” CRUNCHYROLL, <https://www.crunchyroll.com> [https://perma.cc/5QZE-CYL9] (Search on homepage for “Fruits Basket.”).

fans of the series sitting behind booths, displaying their own *Fruits Basket* artwork and seeking to make a profit off their renditions of Natsuki Takaya's original characters. As in most cases of fan artists selling their wares at anime conventions, it is safe to assume that most, if not all, of these fan artists did not get permission from Takaya to sell artwork of her characters.<sup>12</sup> Put bluntly, these fans violate copyright law by merely producing, let alone selling, artistic reproductions of anime and manga characters that belong to someone else.<sup>13</sup>

But should fan artists necessarily just stop what they are doing? Most of these putatively infringing artists often rely on the sale of their fan art as a major, if not sole, source of income.<sup>14</sup> They are artists by trade, and they often rely on commissions for fan art and sales at conventions to make ends meet.<sup>15</sup> A cease-and-desist letter from a manga artist or an anime production company could spell financial disaster for fan artists. Many fan artists assume they do not need to worry, largely because individual Japanese manga artists tend not to press charges against fan artists and often even encourage fan works' production, even if for commercial purposes.<sup>16</sup> Recently, however, the Japanese government, under pressure from larger production companies, has begun to push back against the amount of copyright infringement that occurs in the anime and manga industries.<sup>17</sup> Although individual manga artists oppose these recent

---

<sup>12</sup> See Melissa Anne Agnetti, *When the Needs of the Many Outweigh the Needs of the Few: How Logic Clearly Dictates the First Amendment's Use as a Defense to Copyright Infringement Claims in Fan-Made Works*, 45 SW. L. REV. 115, 126 (2015); Rich Johnston, *Artists Alley, Art Theft, and Copyright Law—A Lawyer Speaks to Bleeding Cool*, BLEEDING COOL (June 10, 2016), <https://bleedingcool.com/comics/artists-alley-art-theft-and-copyright-law-a-lawyer-speaks-to-bleeding-cool/> [perma.cc/VY7D-ZLK7].

<sup>13</sup> See *infra* Section I.C.

<sup>14</sup> See Johnston, *supra* note 12.

<sup>15</sup> *Id.* To read artists' own comments on the importance of fan art to their annual income, see the forum *Otakon*, ARTISTS ALLEY CONFIDENTIAL (Aug. 16, 2017, 6:31 PM), <https://www.artistsalleyconfidential.com/conventions/otakon/> [perma.cc/VY7D-ZLK7].

<sup>16</sup> See *infra* Section II.C.

<sup>17</sup> See generally *Japan Bans Pirated Manga Downloads with Copyright Control Law*, THE JAPAN TIMES (June 5, 2020), <https://www.japantimes.co.jp/news/2020/06/05/national/crime-legal/pirated-manga-ban/> [https://perma.cc/8AKU-LFGP]; Emily Schendl, *Japanese Anime and Manga Copyright Reform*, 15 WASH. U. GLOBAL STUD. L. REV. 631, 645–47 (2016).

government actions as too far-reaching, large production companies are much less tolerant of fan infringement.<sup>18</sup> These companies are largely concerned about the financial losses they may be incurring from what is essentially unofficial merchandise.<sup>19</sup> By exerting the right amount of influence over the Japanese government, production companies could increase their hold on their copyrights and licensing deals to the detriment of small-time fan artists and their livelihoods.

The fans themselves would also suffer from the inability to purchase fan-made artwork because they would lose the ability to choose which kinds of artwork they want to purchase. One of the reasons fans are drawn to certain artists is the artist's specific art-style; they want to purchase artwork, read manga, and watch anime that they find aesthetically pleasing. Manga artists, like all artists, tend to have unique, identifiable art styles.<sup>20</sup> Takaya, for example, is known for giving her characters angular facial features and distinctively large eyes.<sup>21</sup> Avid *Fruits Basket* fans who read the original manga would therefore likely recognize Takaya's artistic rendition of her own characters. Fans could also easily spot official *Fruits Basket* merchandise promoting the 2019 anime adaptation, which utilizes more realistic body proportions, an increased use of lighting and shading, and less solid coloring to make the characters appear more detailed.<sup>22</sup> But what if a fan wanted to buy artwork of the series' heroine, Tohru Honda, that uses different color schemes from Takaya's official prints? Or has her wearing different clothing than her iconic school uniform? Or portrays her with hyper-realistic facial features, as opposed to Takaya's cartoonish style? A fan would unlikely be able to purchase this kind of artwork from Takaya or TMS Entertainment because they are unlikely to produce this kind of artwork; official artwork does not usually vary in its stylistic

---

<sup>18</sup> *Id.* See also *infra* Part II.

<sup>19</sup> Although not an anime production company, Disney is a prime example of this concern. See *infra* notes 96–100 and accompanying text. See also *infra* Part II.

<sup>20</sup> See generally Thaneeya McArdle, *Explore Art Styles*, ART IS FUN, <https://www.art-is-fun.com/art-styles> [<https://perma.cc/PB4B-JMKR>] (“[E]ach artist has his or her own personal art style....”).

<sup>21</sup> See NATSUKI TAKAYA, *FRUITS BASKET ARTBOOK* (2004).

<sup>22</sup> See generally *Fruits Basket* (TMS Entertainment 2019).



rendering. This is where fan artists can come in and fill the resulting gap in the marketplace.<sup>23</sup>

At the same time, Takaya's and TMS Entertainment's rights deserve protection. As the copyright holder and the licensee, respectively, both parties should be allowed to market and profit off of the characters over whom they own legal rights. Under Japanese copyright law, Takaya enjoys the moral right of attribution, ensuring that no artwork is associated with her name that she did not actually create.<sup>24</sup> The easiest way to protect this right would be to ensure that her fans are unable to profit off fan art that borrow not only Takaya's characters, but also her art style. Imagine a fan purchasing a print of Tohru Honda that looks so much like Takaya's art style, that it may as well have been drawn by Takaya herself. This clearly poses an issue. Not only would this kind of fan art violate Takaya's right of attribution, but it would substitute itself for Takaya's own work in the marketplace for artistic renditions of Honda. This is a different scenario from a fan being presented with two pieces of artwork, one clearly drawn by Takaya and the other clearly drawn by a fan, and being able to decide whether she wants to enter the market for official merchandise or the market for fan merchandise. This question now is how to work within the current legal framework to make this latter vision a reality.

This Note will argue that fan artists selling their work at anime conventions should, in certain cases, be protected under the United States Copyright Act's fair use defense, despite the artwork's commercial nature. As long as the fan art utilizes an art style that is so transformative it cannot be attributed to the official source material, there is minimal risk of economic harm or substitution in the marketplace because consumers often knowingly choose to either support officially-licensed work or to support local fan artists. Part I will provide a legal background of the relevant aspects of both American and Japanese copyright law and then discuss how these aspects of copyright law apply to the fan art issue. Part II will

---

<sup>23</sup> This understanding would make fan art a complement to Takaya's official merchandise, rather than a substitute, under a fair use analysis. *See infra* Part II.

<sup>24</sup> *See infra* Section I.B; Copyright Act of Japan, No. 48 of May 6, 1970, art. 19(1), as amended by Law No. 35 of May 14, 2014 *translated in* COPYRIGHT LAW OF JAPAN (2016).

explain how the problematic nature of the current law poses a threat to American fan culture and puts artists and conventions at financial risk. Finally, Part III will propose that, when analyzing commercial fan art under the American fair use defense, courts should focus on the transformative nature of the work, specifically on whether the art style used by the fan artist is transformative enough that a reasonable fan of the series in question would not attribute the fan art to the original artist. The Note will then apply this proposed solution to a hypothetical case, comparing Reddit user Blesseii's artistic rendition of *Fruits Basket*'s heroine to Takaya's official prints of the same character.

## I. THE WORLD OF FAN ART AND COPYRIGHT

### A. Anime, Manga, and Convention Culture

The Merriam Webster Dictionary defines “anime” as “a style of animation originating in Japan that is characterized by stark colorful graphics depicting vibrant characters in action-filled plots, often with fantastic or futuristic themes.”<sup>25</sup> Essentially, it is Japanese animation, drawing initial inspiration from the early Disney era.<sup>26</sup> Manga, on the other hand, are Japanese graphic novels.<sup>27</sup> Manga generally has a similar art style to anime, and many anime are televised or film adaptations of popular manga.<sup>28</sup> Together, anime and manga make up a large portion of Japanese popular culture (“pop culture”). American fascination with Japanese pop culture dates back to the 1980s, as anime shows began streaming on American television channels and groundbreaking anime movies such as *Akira* made their way into American theatres.<sup>29</sup> One possible reason for the popularity of anime and manga in the United States is that these mediums encompass a broader array of genres than the traditional

<sup>25</sup> *Anime*, *supra* note 4.

<sup>26</sup> Yamaguchi Yasuo, *The Evolution of the Japanese Anime Industry*, NIPPON.COM (Dec. 20, 2013), <https://www.nippon.com/en/features/h00043/> [<https://perma.cc/P7FZ-YYUV>].

<sup>27</sup> *See Manga*, *supra* note 1. Note that “manga” and “anime” are both singular and plural terms in the Japanese language.

<sup>28</sup> *Fruits Basket* is a clear example of this tendency. *See* NATSUKI TAKAYA, FRUITS BASKET (1998–2006); *Fruits Basket* (Studio DEEN 2001); TMS Entertainment, *supra* note 22.

<sup>29</sup> ROBIN E. BRENNER, UNDERSTANDING MANGA AND ANIME 11–12 (2007).

American comic book.<sup>30</sup> While American comic books are almost always action-focused, manga and anime also provide titles in horror, romance, comedy, and various other genres. This diversity allowed Japanese pop culture industries to tap into audiences previously unexploited by American comic book creators, namely teenage girls.<sup>31</sup>

Anime and manga continue to have tremendous effects on the American economy. Manga volumes imported from Japan make up half of graphic novels sold in the United States and are steadily overtaking American comics in sales.<sup>32</sup> Over two million Americans are paid subscribers to Crunchyroll, one of the major streaming services providing access to licensed anime.<sup>33</sup> Another indicator of anime's popularity in the United States is the prevalence of anime-specific conventions. Many Americans know San Diego Comic Con as the ultimate gathering of nerds: the event allows fans of Western pop culture to don their favorite superhero costumes, attend exclusive events, and perhaps meet famous individuals within the comic book industry.<sup>34</sup> Anime conventions allow the same for fans of Japanese pop culture. Currently, there are seventy-five anime-exclusive conventions in the United States.<sup>35</sup> Each of these events bring in as many as 20,000 to 100,000 attendees every year.<sup>36</sup> Anime Expo, the

---

<sup>30</sup> *Id.* at 12–13.

<sup>31</sup> *Id.* For a more detailed understanding of the histories of anime and manga, see CHRISTOPHER BOLTON, *INTERPRETING ANIME* (2018); HELEN MCCARTHY, *A BRIEF HISTORY OF MANGA* (2014).

<sup>32</sup> This percentage excludes comics targeted towards children. Avi Green, *Manga Rises in USA as American Comic Sales Continue Sinking*, BLEEDING FOOL (July 21, 2019), <https://bleedingfool.com/blogs/mangas-rise-in-usa-while-american-comic-sales-sink/> [perma.cc/27DV-458U].

<sup>33</sup> *Id.*

<sup>34</sup> See *About Comic Con International*, COMIC-CON INTERNATIONAL: SAN DIEGO, <https://comic-con.org/about> [https://perma.cc/647X-YR3H].

<sup>35</sup> See *List of Anime Conventions*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_anime\\_conventions](https://en.wikipedia.org/wiki/List_of_anime_conventions) [perma.cc/6TME-QY7U].

<sup>36</sup> See Emma Roth, *The Ten Biggest Anime Conventions in the United States*, WHATNERD (Nov. 19, 2019), <https://whatnerd.com/biggest-anime-conventions-united-states/> [perma.cc/J4C8-B3TF].

largest anime convention in the United States, welcomed over 110,000 attendees in 2019.<sup>37</sup>

Anime conventions offer a variety of events for their attendees. These events include world premieres of new anime, costume contests, concerts, and meet-and-greets with Japanese voice actors.<sup>38</sup> Many fans also go to anime conventions for the opportunity to buy original fan art of their favorite characters from local artists.<sup>39</sup> Fan artists at anime conventions usually sell their work in a separate section of the convention floor called the Artists' Alley. Here, attendees can buy prints of fan art as well as homemade stickers, buttons, keychains, and other merchandise. Although Artists' Alleys remain important attractions for “congoers,” the unlicensed sale of fan art raises some legal questions under American copyright law.

## B. Applicable Copyright Law

### 1. Basics of U.S. Copyright Law

American copyright law finds its roots in Article I, Section 8, Clause 8 of the U.S. Constitution, commonly referred to as the “IP Clause.”<sup>40</sup> This clause grants Congress the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>41</sup> Today, the American copyright regime is

---

<sup>37</sup> *Anime Expo 2019 Thrills Fans of Japanese Pop Culture During Four-Day Show in Los Angeles*, ANIME EXPO (June 21, 2019), <https://www.anime-expo.org/2019/06/21/anime-expo-2019-thrills-fans-japanese-pop-culture-four-day-show-los-angeles/> [https://perma.cc/V92M-LJQM]. For reference, San Diego Comic Con welcomed 135,000 attendees in 2019, only 25,000 more than Anime Expo. *Breaking Down Comic-Con 2019 by the Numbers*, SAN DIEGO CONVENTION CENTER (July 11, 2019), <https://www.visitsandiego.com/component/content/article/10-news-stories-spotlights/scene/13-breaking-down-comic-con-2019-by-the-numbers?Itemid=101> [https://perma.cc/DH5F-9QGE].

<sup>38</sup> *See 2019 Year in Review: Reflections, Challenges and Expectations*, ANIME EXPO (Dec. 5, 2019), <https://www.anime-expo.org/2019/12/05/2019-year-review-reflections-challenges-expectations/> [https://perma.cc/VU4F-HFQV].

<sup>39</sup> Anime Expo had over 500 individual artists selling fan works in 2019. *See id.*

<sup>40</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>41</sup> *Id.* “Science” refers to artistic works normally protected under copyright law, whereas “useful arts” refers to inventions now protected under patent law. Eighteenth-century

governed by the U.S. Copyright Act, found in Title 17 of the U.S. Code.<sup>42</sup> The Copyright Act provides protection for specific categories of creative subject matter, including pictorial, graphic, or sculptural (“PGS”) works, as well as literary works.<sup>43</sup> Literary works are “[any] works... expressed in words,” such as books.<sup>44</sup> PGS works include “two-dimensional...works of fine, graphic, and applied art.”<sup>45</sup> Common examples include paintings, sketches, drawings, and the like. Some copyrightable works may fall into multiple categories at once. Comic books, for example, can be registered with the U.S. Copyright Office as either literary works or PGS works, because they are both expressed in words and contain graphic art.<sup>46</sup> Because this Note mainly discusses fan art, it will mainly refer to PGS works, though fanfiction (classified as literary works) will be referred to occasionally as well.

An author owns a copyright in any original work of art that is fixed in a tangible medium of expression.<sup>47</sup> A tangible medium of expression is a physical expression of the creative work, such as a book, painting, or video recording.<sup>48</sup> The required level of creativity for a work to be copyrightable is very low in the United States: only a “modicum of creativity.”<sup>49</sup> An author obtains the copyright as soon as he creates the work, which requires fixing the work in a tangible medium of expression.<sup>50</sup> For example, a poet who comes up with a poem does not actually own a copyright until he writes the poem

---

definitions for these terms differed from how we understand them today. *See* JEANNE C. FROMER & CHRISTOPHER JOHN SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* 3 (2019).

<sup>42</sup> *See generally* U.S. Copyright Act of 1976, 17 U.S.C. § 101 et seq.

<sup>43</sup> *See id.* § 102.

<sup>44</sup> *Id.* § 101.

<sup>45</sup> *Id.*

<sup>46</sup> *See* UNITED STATES COPYRIGHT OFFICE, *CIRCULAR 44: CARTOONS AND COMIC STRIPS* 1 (2015).

<sup>47</sup> *See* 17 U.S.C. §102.

<sup>48</sup> For more on the fixation requirements, see FROMER & SPRIGMAN *supra* note 41, at 17–20.

<sup>49</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

<sup>50</sup> *See* 17 U.S.C. § 302(a).

down on a piece of paper, or records himself reciting it. A copyright generally persists until seventy years after the author's death.<sup>51</sup>

Whoever owns a copyright in a work enjoys certain exclusive rights to the work.<sup>52</sup> The exclusive right this Note will focus on is the right for copyright holders to create derivative works of copyrighted material.<sup>53</sup> A derivative work is “a work based upon one or more preexisting works...in which a work may be recast, transformed, or adapted.”<sup>54</sup> A common example of a derivative work is a movie adaptation of a famous novel, such as *Harry Potter*. Authors will often assign some of the rights to their works to other parties. J.K. Rowling, for example, is the author and copyright holder of *Harry Potter*, but she assigned the right to create movie adaptations of her novels to Warner Brothers.<sup>55</sup> Because the right to create derivative works belongs exclusively to the author, only she can legally create derivatives of her copyrighted works, unless she chooses to transfer that right to someone else.<sup>56</sup>

Fan art is a “derivative work based on any original work that uses its plot's ideas or characters.”<sup>57</sup> Fan art, as well as other aspects of the modern fandom, first became a phenomenon in the United States in the 1960s and the 1970s.<sup>58</sup> During this time, a large following of *Star Trek* fans, particularly women, helped popularize the series through fanfiction.<sup>59</sup> Meanwhile in Japan, fan art became a phenomenon with the development of “doujinshi.”<sup>60</sup> Doujinshi are

<sup>51</sup> *Id.* § 302(a). Duration of a copyright may vary depending on whether the work was created by multiple joint authors, created as a work for hire, or created anonymously. See *id.* §§ 303–04 for a greater understanding of how duration of copyright varies in these situations.

<sup>52</sup> The list of exclusive “economic” rights can be found at *id.* § 106. For moral rights, see Visual Rights Act of 1990, 17 U.S.C. § 106A.

<sup>53</sup> See 17 U.S.C. § 106(2).

<sup>54</sup> *Id.* § 101.

<sup>55</sup> See *id.* § 201(d)(2) for language pertaining to the transfer of exclusive rights under copyright law.

<sup>56</sup> See *id.*

<sup>57</sup> Perova, *supra* note 6, at 31.

<sup>58</sup> See *id.*

<sup>59</sup> See Kate Romanenkova, *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*, 18 INTELL. PROP. L. BULL. 183, 198 (2014). Fanfiction is fan-made literary works that use another author's copyrighted materials. See *id.*

<sup>60</sup> Perova, *supra* note 6.

“amateur-created manga which are commonly based upon existing manga storylines and characters and are created and distributed without authorization from the authors.”<sup>61</sup> Because doujinshi are Japanese comics, they contain PGS elements and thus may be included in a fan art analysis.

Fan art is a derivative work since it is an “art reproduction...based upon one or more preexisting works” that “recast[s], transform[s], or adapt[s] the preexisting work.”<sup>62</sup> Most fan art sold in Artists’ Alleys are derivative works of other artists’ anime and manga characters.<sup>63</sup> As discussed previously, only the copyright holder of fictional characters may legally create derivative works of these characters.<sup>64</sup> Fan artists, without a valid defense, infringe on the copyright holder’s rights. Because unauthorized fan art is putatively infringing, fan artists cannot assert their own copyrights in their own fan art.<sup>65</sup>

Separate from the derivative work right and the other “economic” rights listed in Section 106 of the Copyright Act are moral rights.<sup>66</sup> Moral rights were first introduced into American copyright law with the Visual Artists Rights Act (“VARA”) of 1990.<sup>67</sup> The United States was obligated to introduce moral rights into its copyright regime as part of its membership of the Berne Convention, an international agreement meant to create uniformity between member states’ copyright laws.<sup>68</sup> Prior to its entry into the Berne Convention in 1988, the United States did not extend moral rights to authors under the Copyright Act.<sup>69</sup> Congress passed VARA so that the United States would be in compliance with Article 6*bis* of the

---

<sup>61</sup> Melissa De Zwart, *Japanese Lessons: What Otaku Can Teach Us About Copyright and Gothic Girls*, 35 *ALT. L.J.* 27, 28 (2010).

<sup>62</sup> See 17 U.S.C. § 101; see also *supra* text accompanying notes 44–46.

<sup>63</sup> See *infra* Section I.B.2.

<sup>64</sup> See 17 U.S.C. § 106(2). The exception to this general principle is the fair use defense. See *infra* Section I.C.

<sup>65</sup> See 17 U.S.C. § 103(a).

<sup>66</sup> Moral rights can be found at 17 U.S.C. § 106A.

<sup>67</sup> *Id.*

<sup>68</sup> See Berne Convention for the Protection of Literary and Artistic Works, amended 1979, 828 U.N.T.S. 251; see also FROMER & SPRIGMAN, *supra* note 41, at 5–6.

<sup>69</sup> See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

Berne Convention, which requires member states to grant the rights of attribution and integrity to authors.<sup>70</sup> The right of attribution allows authors to claim authorship of their own work and prevent their name from being attributed to works of visual art they did not create.<sup>71</sup> The right of integrity allows authors to prevent “the distortion, mutilation, or modification of [their] work which would be prejudicial to [their] honor or reputation,” and, in the event a work is mutilated or distorted, allows authors to prevent the use of their name in connection with the work.<sup>72</sup> Unlike the economic rights provided for by the Copyright Act, however, moral rights under American copyright law only belong to authors of works of visual art.<sup>73</sup> Works of visual art are defined as paintings, drawings, prints, sculptures or photographs that exist in a single copy or “in a limited edition of 200 copies or fewer.”<sup>74</sup> This limitation on moral rights under American copyright law is significant for manga and pop culture authors, whose works are largely mass-produced, and therefore not considered works of visual art.<sup>75</sup> However, many scholars have dabbled into the possibility of incorporating some aspects of moral rights into fair use defenses for fan works.<sup>76</sup>

## 2. Copyrightability of Characters

Fictional characters can be copyrightable under American copyright law. The Second Circuit first discussed this principle in its appellate decision *Nichols v. Universal Pictures Corp.*<sup>77</sup> Judge

---

<sup>70</sup> Berne Convention for the Protection of Literary and Artistic Works, amended 1979, 828 U.N.T.S. 251, art. 6bis(1), reads in full:

Independently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

<sup>71</sup> See 17 U.S.C. § 106A(a)(1).

<sup>72</sup> *Id.* § 106A(a)(2).

<sup>73</sup> See *id.* § 106A(b).

<sup>74</sup> *Id.* § 101.

<sup>75</sup> To give an example, recall that eighteen million copies of the *Fruits Basket* manga have been sold in Japan—well in excess of the 200-copy limit set by § 101 of the U.S. Copyright Act. ICv2, *supra* note 2.

<sup>76</sup> See *infra* Section I.E.2.

<sup>77</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).



Learned Hand, writing for the majority, raised the possibility that a fictional character could infringe on another's copyrighted work:

If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress...it follows that *the less developed the characters, the less they can be copyrighted.*<sup>78</sup>

These “less developed” characters that Learned Hand described are stock characters, those that “require no development from the writer.”<sup>79</sup> According to Judge Hand, stock characters could not receive copyright protection.<sup>80</sup> However, more developed characters, such as the stars of Shakespeare's plays, were entitled to copyright protection.<sup>81</sup> Other Federal Courts of Appeals in the United States have since upheld Judge Hand's assertion regarding the copyrightability of characters.<sup>82</sup> In *Gaiman v. McFarlane*, the Seventh Circuit held that a character is copyrightable so long as he is “distinctive” enough from stock characters.<sup>83</sup> Count Cogliostro from the comic series *Spawn*, for example, was distinctive enough to be copyrightable once he was given a name, a physical depiction, and dialogue.<sup>84</sup> The Ninth Circuit held similarly in *D.C. Comics v. Towle*, which answered the question of whether the Batmobile from the *Batman* franchise was a copyrightable character.<sup>85</sup> To answer this question, the Ninth Circuit put forth a three-part test: (1) the character had to have “physical as well as conceptual qualities;” the character had to

---

<sup>78</sup> *Id.* at 121 (emphasis added).

<sup>79</sup> *Stock Character*, DICTIONARY.COM, <https://www.dictionary.com/browse/stock-character> [perma.cc/QN95-XDRZ].

<sup>80</sup> *Nichols*, 45 F.2d at 121.

<sup>81</sup> *Id.*

<sup>82</sup> *See, e.g.*, *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004); *D.C. Comics v. Towle*, 802 F.3d 1012 (9th Cir. 2015); *Paramount Pictures Corp. v. Axanar Prod., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506 (C.D. Cal. 2017).

<sup>83</sup> *Gaiman*, 360 F.3d at 660.

<sup>84</sup> *Id.* at 661.

<sup>85</sup> *D.C. Comics*, 802 F.3d at 1021.

be “sufficiently delineated” so it was recognizable as the same character whenever it appeared; and (3) the character had to have “some unique elements of expression.”<sup>86</sup> Applying this test to the Batmobile, the court found that Batman’s famous vehicle was a copyrightable character.<sup>87</sup> The defendant’s replicas of the Batmobile were therefore infringing derivative works.<sup>88</sup> More recently, the District Court for the Central District of California held that the entire Vulcan alien species from *Star Trek* was entitled to copyright protection.<sup>89</sup> Regardless of the jurisdiction, American courts agree that fictional characters are entitled to copyright protection so long as they are sufficiently distinct from stock characters. This is important for fan artists because most fan art depicts either one or more characters from a fictional series. As long as these characters are copyrightable, the fan art may be putatively infringing derivative works.

### 3. Art Styles as Indicative of Substantial Similarity

Relevant to determining the level of substantial similarity between two works is the debate over the copyrightability of art styles. The Supreme Court has yet to address whether art styles may be copyrightable. Some federal courts, however, have issued rulings in cases where defendants had copied another artist’s art style. For example, in *Steinberg v. Columbia Pictures Industries*,<sup>90</sup> the Southern District of New York held that “style is one ingredient of ‘expression,’” and that copying another artist’s style could therefore potentially indicate infringement.<sup>91</sup> The artwork at issue in *Steinberg* was a drawing of New York City that was used as a cover illustration for *The New Yorker*.<sup>92</sup> The executive art director for Columbia Pictures, in commissioning a poster for the movie *Moscow on the Hudson*, explicitly told the hired artist to draw from the *New Yorker* cover illustration in creating his design.<sup>93</sup> As such, the *Moscow on the*

---

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1025.

<sup>88</sup> *Id.*

<sup>89</sup> See *Paramount Pictures Corp. v. Axanar Prod., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, \*11 (C.D. Cal. 2017).

<sup>90</sup> *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1978).

<sup>91</sup> *Id.* at 712.

<sup>92</sup> *Id.* at 709.

<sup>93</sup> *Id.*

*Hudson* poster utilized a vantage point, details on the buildings, and calligraphy that was clearly taken from the *New Yorker* poster.<sup>94</sup> The court found that, because a large portion of the *Moscow on the Hudson* poster was substantially similar to the *New Yorker* illustration, Columbia Pictures had committed clear copyright infringement.<sup>95</sup>

In another case, *Walt Disney Productions v. Air Pirates*,<sup>96</sup> the Ninth Circuit Court of Appeals was presented with a case in which independent cartoonists had copied Disney's art style into their own series of comics, which depicted Mickey Mouse and his companions in adult scenarios that were "promiscuous" and "drug-inducing."<sup>97</sup> Not only did the comics portray Mickey Mouse and friends in an art style that was almost identical to the one used in the original *Steamboat Willie* cartoon, but they were given labels such as "Silly Sympathies Presents: The Mouse,"<sup>98</sup> an obvious reference to Disney's trademarked title for its "Silly Symphony" comics.<sup>99</sup> In the eyes of the Ninth Circuit, "it is plain that copying a comic book character's graphic image constitutes copying to an extent sufficient to justify a finding of infringement."<sup>100</sup>

### C. The Fair Use Defense

One legal defense that fan artists can try to assert is the fair use defense.<sup>101</sup> Under the fair use defense, "the fair use of a copyrighted work...is not an infringement of copyright."<sup>102</sup> When deciding

---

<sup>94</sup> *Id.* at 712–13.

<sup>95</sup> *Id.* at 711–12. The obvious bad intent on Columbia Pictures' part likely played a role in this ruling. *See id.* at 709 (discussing how Columbia Pictures' executive art director literally had a poster of the *New Yorker* illustration hanging in his office during the time the poster for *Moscow on the Hudson* was being designed).

<sup>96</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

<sup>97</sup> *Id.* at 753.

<sup>98</sup> For a visual depiction that shows *Steamboat Willie* alongside one of *Air Pirates*' comics, see Agnetti, *supra* note 12, at 145.

<sup>99</sup> The issue of whether use of the title "Silly Sympathies" constituted trademark infringement was remanded to the lower court. *See Air Pirates*, 581 F.2d at 759.

<sup>100</sup> *Id.* at 756. Like in *Steinberg*, the court took note of Defendants' apparent intent to copy Plaintiff's art style as closely as possible. *Id.* at 758. ("[H]ere the copying of the graphic image appears to have no other purpose than to track Disney's work as a whole as closely as possible.")

<sup>101</sup> The fair use defense is codified at 17 U.S.C. § 107.

<sup>102</sup> *Id.* § 107.

whether a putatively infringing use of a copyrighted work is protected under the fair use defense, a court must look at four factors: (1) purpose and character; (2) nature of the copyrighted work; (3) amount and substantiality; and (4) effect on the market.<sup>103</sup> The most important case analyzing the four factors is the Supreme Court decision in *Campbell v. Acuff-Rose*, which answers the question of whether the music group 2 Live Crew infringed on Acuff-Rose's copyright in the song "Oh, Pretty Woman" by creating its own parody of the song.<sup>104</sup> This case provides the most guidance from the Supreme Court on how to use the fair use defense and most clearly illustrates how to apply each factor.

### 1. Purpose and Character

The first fair use factor instructs the court to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit or educational purposes."<sup>105</sup> Justice Souter, writing for the majority in *Acuff-Rose*, held that "the central purpose of this investigation is to see...whether the new work merely 'supersede[s] the objects' of the original creation [citation omitted], or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."<sup>106</sup> Justice Souter emphasized the importance of the transformative nature of the putatively infringing work, noting that allowing for transformative works furthers the IP Clause's goal of "promot[ing] the progress of science and the useful arts," and arguing that the more transformative the work, the less judges need to look at the other fair use factors.<sup>107</sup>

The first factor instructs judges to consider whether the putatively infringing work is created for commercial purposes because, if so, it is more likely to be found infringing on copyright.<sup>108</sup> As a result, the Court of Appeals in *Acuff-Rose* held that 2 Live Crew's parody song was infringing largely because the group created it for

---

<sup>103</sup> *Id.*

<sup>104</sup> *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

<sup>105</sup> 17 U.S.C. § 107.

<sup>106</sup> *Campbell*, 510 U.S. at 579.

<sup>107</sup> U.S. CONST. art. I, § 8, cl. 8; *id.* at 572.

<sup>108</sup> *See* 17 U.S.C. § 107; *Campbell*, 510 U.S. at 572.

commercial purposes.<sup>109</sup> The Supreme Court reversed this judgment because, while a work's commercial nature is an important element to consider in a fair use inquiry, it is only one of many and must be weighed alongside all other elements.<sup>110</sup> Instead, the Court found that the parodic nature of 2 Live Crew's song made it highly transformative, and that the first factor weighed in 2 Live Crew's favor despite the song's commercial nature.<sup>111</sup>

## 2. Nature of the Copyrighted Work

The second fair use factor looks at "the nature of the copyrighted work" that the new work putatively infringes.<sup>112</sup> If the source material for the putatively infringing work is factual, rather than fictitious, a court will be more likely to find fair use.<sup>113</sup> Justice Souter's rationale was that "some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied."<sup>114</sup> In *Acuff-Rose*, and for this Note's purposes regarding fan art, this factor is not very helpful and requires little analysis: musical compositions are clearly intended to have strong copyright protection, as are other forms of creative expression such as artistic portrayals of fictional characters.<sup>115</sup>

## 3. Amount and Substantiality

The third fair use factor looks at "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."<sup>116</sup> This factor asks whether the alleged infringer appropriated a "reasonable" amount from the original copyrighted work.<sup>117</sup> In *Acuff-Rose*, the Court found that 2 Live Crew had taken a substantial amount from Roy Orbison's "Oh, Pretty Woman," including

---

<sup>109</sup> *Campbell*, 510 U.S. at 572.

<sup>110</sup> *Id.*

<sup>111</sup> *See id.* at 583–85.

<sup>112</sup> 17 U.S.C. § 107.

<sup>113</sup> *See, e.g., Campbell*, 510 U.S. at 586; *Stewart v. Abend*, 495 U.S. 207, 237–38 (1990).

<sup>114</sup> *Campbell*, 510 U.S. at 586.

<sup>115</sup> *See, e.g., id.*

<sup>116</sup> 17 U.S.C. § 107.

<sup>117</sup> *Campbell*, 510 U.S. at 586.

the song's opening bass riff and its first line of lyrics.<sup>118</sup> However, in the case of a parody such as 2 Live Crew's song, large amounts of appropriation are necessary; the parody would be unrecognizable and ineffective otherwise.<sup>119</sup>

There are cases, however, where the alleged infringer takes too much from the source material, and the third factor consequently weighs against him. This was the case in *Harper & Row v. Nation Enterprises*.<sup>120</sup> In *Harper & Row*, the plaintiff-publishing company sued defendant-magazine for copyright infringement after the magazine published an excerpt from President Gerald Ford's upcoming memoir without authorization.<sup>121</sup> The third fair use factor weighed strongly against the infringing magazine here; although the amount copied from the memoir was only 13% of the total copyrighted work, the magazine had copied what the district court described as "the heart of the book [citation omitted]," specifically the section of the memoir where President Ford explains why he pardoned President Richard Nixon.<sup>122</sup> Because this small portion was so central to the memoir, the court found that it was a substantial portion of the copyrighted work, and so the magazine was liable for infringement under this factor.<sup>123</sup>

#### 4. Effect on the Market

The fourth and final fair use factor analyzes "the effect of the [putatively infringing] use upon the potential market for or value of the copyrighted work."<sup>124</sup> This factor calls for courts to consider the economic impact the putatively infringing work has on the marketability of the original copyrighted work. In *Acuff-Rose*, the question was whether 2 Live Crew's parody song could potentially supersede Roy Orbison's song in the marketplace for music, resulting in market substitution.<sup>125</sup> Courts must look at not only the current market

---

<sup>118</sup> *Id.* at 588.

<sup>119</sup> *Id.*

<sup>120</sup> *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539 (1985).

<sup>121</sup> *Id.* at 542–44.

<sup>122</sup> *See id.* at 564; *see also id.* at 539 for a comparison of the copyrighted material with the material appropriated for the magazine article.

<sup>123</sup> *Id.* at 566.

<sup>124</sup> 17 U.S.C. § 107.

<sup>125</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 591 (1994).

for the copyrighted work, but also potential markets the copyright holder might want to enter.<sup>126</sup> 2 Live Crew, for example, failed to address whether their rap parody of “Oh, Pretty Woman” would have a negative impact on the market for rap versions of the song, and the case was remanded on this issue.<sup>127</sup> 2 Live Crew’s parody would have a negative effect on the potential market for rap versions of “Oh, Pretty Woman” if, for example, Acuff-Rose planned to sell licenses to create such rap versions to other musical groups, thus being able to profit off these derivative works.<sup>128</sup> Courts will often find that, the more transformative the putatively infringing work, the lower the risk of market substitution.<sup>129</sup>

### 5. Fair Use and Fan Works so Far

There has been very little litigation on the issue of when fan works are protected by fair use, and the cases that do exist do not discuss fan-made PGS works. One example often cited by scholars is *Suntrust v. Houghton Mifflin Co.*<sup>130</sup> The “fan work” at issue was Alice Randall’s novel *The Wind Done Gone*, “a critique of [Margaret Mitchell’s] *Gone With the Wind*’s depiction of slavery and the Civil War-era American South.”<sup>131</sup> Randall had appropriated characters, plot elements, and even some dialogue from Mitchell’s novel into her own version of the story. Christina Chung, writing on *Suntrust* and analyzing Randall’s novel in a similar manner as fanfiction, noted that both Randall’s novel and fanfiction tend to expand upon the elements appropriated from the original work. Randall, for example, expands upon the personalities of *Gone With the Wind*’s black characters, giving them more redeeming qualities.<sup>132</sup> The Eleventh Circuit Court of Appeals held that, though Randall’s use of Mitchell’s work was prima facie copyright infringement, *The*

---

<sup>126</sup> *Id.* at 590.

<sup>127</sup> *Id.* at 590, 593–594.

<sup>128</sup> *Id.* at 593.

<sup>129</sup> *See, e.g., id.* at 591; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

<sup>130</sup> *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

<sup>131</sup> *Id.* at 1259.

<sup>132</sup> Chung, *supra* note 8, at 370.

*Wind Done Gone* was transformative enough that it would be considered fair use.<sup>133</sup>

Other creators have not been as lucky as Randall. One example is *Warner Bros. Entertainment v. RDR Books*,<sup>134</sup> a case in which Warner Brothers prevented a *Harry Potter* fan from publishing his own unlicensed encyclopedia on J.K. Rowling's extensive magical universe.<sup>135</sup> This was a much harder case for the *Harry Potter* fan than *Suntrust* was for Randall. Rather than holding that the lexicon was a transformative derivative work under § 106(2), the court held that the lexicon was a violation of the § 106(1) reproduction right, because it directly copied language from the *Harry Potter* books for its entries.<sup>136</sup> Fair use was thus harder to establish in this case.<sup>137</sup>

Another case in which a fan work was barred by copyright law is *Paramount Pictures v. Axanar Productions*.<sup>138</sup> In *Axanar*, a devoted *Star Trek* fan was sued by Paramount Pictures after he raised money via online campaigns to fund his own “professional production” of a *Star Trek* movie.<sup>139</sup> The court, applying the four fair use factors, held that the president of Axanar Productions could not assert a fair use defense against Paramount Pictures.<sup>140</sup> The fourth factor in particular is weighed strongly against the defendant: the creation of such a *Star Trek* film was the kind of potential market that Paramount Pictures would likely wish to enter. By marketing his own film as “the best *Star Trek* movie script ever” and seeking to distribute his film through Netflix, the president of Axanar Productions would most likely substitute Paramount Pictures' *Star Trek* films for his own in the marketplace.<sup>141</sup>

---

<sup>133</sup> See *Suntrust Bank*, 268 F.3d at 1266–67, 1276.

<sup>134</sup> *Warner Bros. Ent. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

<sup>135</sup> See *id.* at 521–24.

<sup>136</sup> See *id.* at 534–38. The court held the lexicon was not a derivative work because it did not “recast, transform, or adapt” the *Harry Potter* franchise in any way. See *id.* at 538–39 (citing *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 521 (7th Cir. 2002)).

<sup>137</sup> See *Warner Bros. Ent.*, 575 F. Supp. 2d at 551.

<sup>138</sup> *Paramount Pictures Corp. v. Axanar Prod., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506 (C.D. Cal. 2017).

<sup>139</sup> *Id.* at \*1.

<sup>140</sup> *Id.* at \*7.

<sup>141</sup> *Id.* at \*9.



*D. Japanese Copyright Law vs. American Copyright Law*

Like American copyright law, Japanese copyright law protects both literary works and artistic (PGS) works.<sup>142</sup> Japanese copyright law also recognizes the right to create derivative works as an exclusive right of the author.<sup>143</sup> However, Japanese law also provides that “the author of the pre-existing work shall have the same rights as those the author of the derivative work has...” in situations where another person creates the derivative work.<sup>144</sup> The issue of whether fictional characters are independently copyrightable in Japan is a harder question to answer than in the United States for a number of reasons. First, Japanese courts are more unpredictable than U.S. courts because they do not follow the practice of *stare decisis*, so there is conflicting case law on the issue in Japan.<sup>145</sup> Second, copyright law and trademark law blend together much more seamlessly in Japan than in the United States, meaning that courts will apply trademark analyses to copyright issues, such as the merchandising of fictional characters.<sup>146</sup> Finally, little case law on the issue exists to begin with, as Japan is a much less litigious society than the United States.<sup>147</sup>

Like the United States, Japan is a member of the Berne Convention<sup>148</sup> and, in compliance with its membership, grants the moral rights of attribution and integrity to authors.<sup>149</sup> Unlike American copyright law, however, Japanese copyright law extends moral rights to all copyright authors, not just authors of visual works of art.<sup>150</sup> Japanese copyright law also differs from American copyright

---

<sup>142</sup> Copyright Act of Japan, *supra* note 24, art. 10(1)(i), (iv).

<sup>143</sup> Tiffany Lee, *Fan Activities from P2P File Sharing to Fansubs and Fanfiction: Motivations, Policy Concerns, and Recommendations*, 14 TEX. REV. ENT. & SPORTS L. 181, 182 (2013).

<sup>144</sup> Copyright Act of Japan, *supra* note 24, art. 28.

<sup>145</sup> See Kenneth L. Port, *Copyright Protection of Fictional Characters in Japan*, 7 WIS. INT'L L.J. 205, 209, 213 (1988).

<sup>146</sup> See *id.* at 214.

<sup>147</sup> See Lee, *supra* note 143, at 186. For more information on how case law surrounding this topic conflicts in Japan see Port, *supra* note 145.

<sup>148</sup> MASAYASU ISHIDA, JAPAN PATENT OFFICE, OUTLINE OF THE JAPANESE COPYRIGHT LAW 3 (2008).

<sup>149</sup> See Copyright Act of Japan, *supra* note 24, art. 19(1), 20.

<sup>150</sup> See *id.* art. 18–20.

law in that, rather than having a broad fair use defense, the Copyright Act of Japan lays out a long list of explicit limitations on an author's copyright.<sup>151</sup> Although the most recent amendment to the Copyright Law of Japan expanded permissible uses of copyrighted works, most of these changes were in response to recent changes in technology: for example, museums can now create digital content about their exhibitions.<sup>152</sup>

Despite having a civil law society like the United States, Japan is culturally much less litigious.<sup>153</sup> Attorney Tiffany Lee, former researcher for the University of California, Los Angeles Law Library, describes the alternate steps Japanese parties often take to resolve legal disputes:

Parties will first attempt a process of conciliation and apology; lawsuits are considered the worst possible outcome since they largely ruin relationships in a public way, reflecting poorly on all parties involved. Even in the case of internet music piracy, rather than bring lawsuits as record companies in the U.S. did, the Japanese industry reacted by drastically cutting CD prices; they gave the fans what they wanted.<sup>154</sup>

This tendency to avoid lawsuits extends into doujinshi culture for a number of reasons. According to Lee, the doujinshi market has long been accepted by manga artists in Japan because it can act as a measure of success: if a doujinshi based on a certain manga becomes particularly popular, it can help increase popularity of the original manga.<sup>155</sup> This can be described using the American notion of complements and substitutes in the marketplace: fans' interest in doujinshi, rather than substituting interest in manga, complements manga in the marketplace and even encourages its purchase. In a similar vein, Japanese copyright holders are generally unconcerned with the prevalence of doujinshi, likely because it often differs so

---

<sup>151</sup> *See id.* art. 30–50.

<sup>152</sup> *See* MIZUE FUNAKOSHI & MIYUKI TSUDA, NATIONAL DIET LIBRARY, OVERVIEW OF THE AMENDED COPYRIGHT ACT OF JAPAN AND ITS IMPACT ON NDL SERVICES 4 (2019).

<sup>153</sup> *Supra* text accompanying note 147.

<sup>154</sup> *Supra* text accompanying note 147.

<sup>155</sup> Lee, *supra* note 143, at 185–86.

much from the source material that no one would purchase it in place of the original manga. A major example of this is the tendency of doujinshi authors to depict manga characters in homosexual relationships that would never be written into the official serialization of the manga.<sup>156</sup>

Another reason manga artists and anime production companies do not usually sue doujinshi artists is financial. Manga artists and production companies often do not have the money to pursue litigation, and the costs of negative publicity arising out of a lawsuit could be just as damaging to a potential plaintiff as the financial costs.<sup>157</sup> This risk of negative publicity deters copyright holders from bringing legal actions that may alienate their fanbases.<sup>158</sup>

Finally, according Professor Melissa De Zwart of the University of South Australia, doujinshi culture is tolerated in Japan because “the borrowing and reuse [sic] of characters is a well-established cultural and creative practice in Japan.”<sup>159</sup> De Zwart writes that, during the post-war economic boom in Japan when the manga industry first emerged, it was already “common practice [for creators] to rework and reuse existing characters and in fact real people...” when creating their own works.<sup>160</sup> This “belief that it is safer, superior, and more appropriate to borrow rather than to innovate” even has a name in Japan: “niban-te-shoho,” or “copycat syndrome.”<sup>161</sup>

## II. THE LEGALITY OF FAN ART AND OTHER LEGAL DEBATES

Recall Reddit user Blesseii, who created their own rendition of *Fruits Basket*'s heroine to celebrate the series' new anime adaptation.<sup>162</sup> Unlike the movie poster designer in *Steinberg* or the comic artists in *Air Pirates*, Blesseii made no attempt to copy Takaya's art style when drawing her character.<sup>163</sup> Because of the differing art styles, Blesseii's work may be transformative enough to be entitled

---

<sup>156</sup> *Id.* at 187.

<sup>157</sup> *Id.* at 186.

<sup>158</sup> *Id.*

<sup>159</sup> De Zwart, *supra* note 61, at 29.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See supra* Introduction; @Blesseii, *supra* note 7.

<sup>163</sup> *See supra* Section I.B.3.

to a fair use defense.<sup>164</sup> But if Blesseii wanted to sell prints of her drawing to other *Fruits Basket* fans, there could be a chance her work runs the risk of substituting Takaya’s original works in the marketplace.<sup>165</sup> Can a work be transformative enough that it no longer substitutes the original work in the marketplace, but rather complements it? Is this not the case with fan art, which is often sold alongside official merchandise?<sup>166</sup> This Note will now look at the current circuit split on the importance of transformativeness, how the current state of the law does not provide clear guidance or protection for fan artists, and how current legal scholarship does not properly address this issue. The Note will then propose a means of determining the legality of commercial fan art.

#### A. *The Circuit Split Over the Importance of Transformativeness*

There is a significant circuit split over how much courts should consider a work’s transformative nature when conducting a fair use analysis. The Second Circuit weighs transformativeness very heavily in its fair use analyses.<sup>167</sup> The leading case in this circuit is *Cariou v. Prince*,<sup>168</sup> in which the Court of Appeals had to decide whether artist Richard Prince could assert a fair use defense after he cut up several of Patrick Cariou’s photographs and incorporated them into his own collages.<sup>169</sup> Cariou’s photographs were a series of landscapes and portraits depicting Jamaica and the Rastafarians who lived there.<sup>170</sup> Prince, “a well-known appropriation artist,”<sup>171</sup> incorporated Cariou’s photographs into his own art pieces by cutting up copies of the photos and incorporating them into collages.<sup>172</sup> In some instances, he painted “lozenges” over the individuals in

---

<sup>164</sup> See *supra* notes 122–124.

<sup>165</sup> See *supra* notes 125–127.

<sup>166</sup> See *infra* text accompanying notes 257–259 (discussing AnimeNYC’s policy of allowing fan art to be sold in Artists’ Alleys, while officially-licensed merchandise is sold in the exhibit hall).

<sup>167</sup> See, e.g., *Cariou v. Prince*, 714 F.3d 694, 705–06 (2d Cir. 2013).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 698.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 699.

<sup>172</sup> *Id.*

Cariou's portraits to differentiate them from Cariou's original works.<sup>173</sup> While Cariou's original photographs could easily be made out from some of Prince's works, other appropriation works created by Prince greatly obscured Cariou's original works.<sup>174</sup>

In applying the first fair use factor, the Second Circuit Court of Appeals quoted the Supreme Court's assertion in *Acuff-Rose* that, "to qualify as a fair use, a new work generally must alter the original with 'new expression, meaning, or message.'"<sup>175</sup> The court noted how Prince transformed the peaceful aesthetic of Cariou's photos into more erotic collages, and how "Prince's composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs, as is the expressive nature of Prince's work."<sup>176</sup> The first factor weighed heavily in Prince's favor because the transformative nature of his works almost completely changed the tone and expression of Cariou's original photographs.

The court paid less attention to the second and third factors. For the second fair use factor, the court quickly noted that "Cariou's work is creative and published," and thus close to the core of intended copyright protection.<sup>177</sup> This was the one factor that clearly weighed in Cariou's favor.<sup>178</sup> Addressing the third factor, the court stated that the amount and substantiality borrowed from the original work may vary depending on the purpose and character of the use, as determined under the first factor.<sup>179</sup> The court also notes that "the law does not require that the secondary artist may take no more than is necessary" from the original work, and that the secondary artist must be permitted to take enough from the original work that he is able to "conjure up *at least* enough of the original' to fulfill its transformative purpose."<sup>180</sup> On this issue, the Court of Appeals found in Prince's favor as to twenty-five of the putatively infringing works, and remanded the case to the district court to decide whether

---

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 700–01.

<sup>175</sup> *Id.* at 706 (quoting *Campbell v. Acuff-Rose*, 510 U.S. 569, 579 (1994)).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 710.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* (quoting *Campbell*, 510 U.S. at 587–88) (internal quotations omitted).

the five remaining works took more than necessary under the third factor.<sup>181</sup> Prince was allowed to take “more than necessary” from Cariou’s original work because, if he was too restricted in the amount and substantiality he was allowed to borrow from the original work, his collages would not have fulfilled their transformative purpose.

Next was the issue of how Prince’s works affected the marketplace. Addressing the fourth fair use factor, the court noted that, in the Second Circuit, “our concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.”<sup>182</sup> In the Second Circuit, a putatively infringing work usurps the market for a copyrighted work when the nature of the infringing work and its target audience is the same as the copyrighted work, thereby making it likely that the secondary use is stealing consumers from the market for the original work.<sup>183</sup> The court found it was very unlikely that Prince’s works had usurped Cariou’s, given their different artistic aesthetics and intended audiences.<sup>184</sup> The fourth factor therefore weighed in Prince’s favor.<sup>185</sup>

After applying the four fair use factors, the court found in favor of Prince, relying heavily on the first fair use factor and the transformative nature of Prince’s collages:

Prince’s images...have a different character, give Cariou’s photographs a new expression, and employ new aesthetics with creative and communicative results distinctive from Cariou’s...In twenty-five of his

---

<sup>181</sup> *Id.* at 710–11.

<sup>182</sup> *Id.* at 708 (quoting *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006)).

<sup>183</sup> The Second Circuit gives, as an example, the case of *Castle Rock*, in which a trivia game inspired by the television series *Seinfeld* was held to be infringing. *Id.* at 709. Addressing the fourth fair use factor in this case, the court noted that the copyright holder of *Seinfeld* was very likely to one day create a trivia game targeted towards fans of the show, as the infringing game was. *Id.* For a discussion of the case and how it is illustrative of the Second Circuit’s approach to the fourth fair use factor, see *id.*

<sup>184</sup> *Id.* The court also took into consideration under this factor the fact that Cariou had not marketed his photographs to the same extent that Prince marketed his collages. Cariou made only \$8,000 from collections of his works, while Prince made millions. *Id.*

<sup>185</sup> *Id.*

artworks, Prince has not presented the same material as Cariou in a different manner, but instead has ‘added something new’ and presented images with a fundamentally different aesthetic.<sup>186</sup>

The court ruled in Prince’s favor largely because the collages were transformative enough to give Cariou’s photographs new meaning. Should Blesseii decide to sell their fan art of Tohru Honda within the Second Circuit states, and consequently be sued for copyright infringement, the court would most likely focus on the transformative nature of Blesseii’s artwork as compared to Takaya’s original source material, thus ruling in Blesseii’s favor. There is a chance that this hypothetical case would be less favorable to Blesseii than *Cariou* was to Prince. No matter how transformative Blesseii’s art style is, they still use Takaya’s copyrighted character in creating their piece. A parody-based argument, similar to the one made in *Acuff-Rose*, would be unavailable here, as fan art is not usually a commentary on the original work. That said, there is still a strong argument that can be made in Blesseii’s favor that follows the same logic as parody: fan art needs to copy at least a little from the original source material in order to be recognizable as fan art. Blesseii could also make many similar arguments to Prince’s arguments in *Cariou*: that their fan art is aesthetically different from Takaya’s work; that it does not risk usurping the market for Takaya’s work, as Blesseii’s work is different in nature; and that their work uses a different medium, color palette, and presentation from Takaya’s work. As long as fan art does not copy too much from the original work, then it should be protected under a *Cariou*-based approach to the fair use defense.

The Court of Appeals for the Seventh Circuit criticized the *Cariou* ruling in *Kienitz v. Sconnie Nation*,<sup>187</sup> a case in which a photographer sued a t-shirt manufacturer for using his copyrighted image of a politician in one of their t-shirt designs.<sup>188</sup> The alleged infringer had taken the plaintiff’s photo of Mayor Paul Soglin, heavily edited

---

<sup>186</sup> *Id.* at 708 (citation omitted).

<sup>187</sup> *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756 (7th Cir. 2014).

<sup>188</sup> *Id.* at 757.

it, and placed it on a t-shirt mocking the politician for wanting to shut down the popular Mifflin Street Block Party.<sup>189</sup>

The court did find fair use in this case, albeit for different reasons than the court in *Cariou*. Judge Easterbrook, reflecting on the importance of transformativeness in a fair use analysis, wrote that “[w]e’re skeptical of *Cariou*’s approach, because asking exclusively whether something is ‘transformative’ not only replaces the list [of fair use factors] in § 107 but also could override 17 U.S.C. § 106(2), which protects [the right to create] derivative works.”<sup>190</sup> Judge Easterbrook was concerned that, by placing so much emphasis on how transformative a work is under the first factor, the Second Circuit consequently disregarded the importance of the other three factors. He also pointed out that the word “transformativeness” does not even appear in the section of the Copyright Act that lays out the four fair use factors.<sup>191</sup> While this is true, Judge Easterbrook did concede that the Supreme Court, in *Acuff-Rose*, mentioned transformativeness as part of the first factor.<sup>192</sup> He believed, however, that the Second Circuit’s emphasis on transformativeness caused the *Cariou* court to conduct a separate analysis from the four factors listed in the copyright statute.<sup>193</sup>

Rather than focusing on the transformative and parodic nature of the t-shirt, the court instead held the shirt was fair use largely because it did not pose a risk to the original photograph’s marketability. Judge Easterbrook wrote that the fourth factor, not the first factor, is usually the most important when determining whether a work is fair use, a very different approach from the Second Circuit.<sup>194</sup> In the present case, the Seventh Circuit held that the t-shirt with the politician’s face on it was not a substitute for a photograph of the politician (a prohibited use), but rather it complemented the photograph in the marketplace (a permissible use).<sup>195</sup> Analyzing the other three factors, the Seventh Circuit Court of Appeals held that

---

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 758.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* (citing *Campbell v. Acuff-Rose Music, Inc.*, 520 U.S. 569, 579 (1994)).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 758–59.



the shirt design was fair use: under the first factor, the shirt design's purpose was clearly for political commentary; under the second factor, although photographs are usually at the core of intended copyright protection, the original photographer acknowledged that the photograph had little monetary value;<sup>196</sup> and under the third factor, the court found that the original photograph was so heavily edited, that the amount and substantiality taken was not in excess of what should be permitted under the fair use defense.<sup>197</sup>

This holding emphasized the importance of whether a putatively infringing work is a permissible use (complementing the copyrighted work in the marketplace) or an impermissible use (substituting the copyrighted work in the marketplace) pursuant to the fourth factor.<sup>198</sup> As applied to the hypothetical Blesseii case, the Seventh Circuit would focus on whether Blesseii's artwork complements or substitutes Takaya's work in the marketplace. Applying this economic-centric focus, the court would most likely rule that, because Blesseii's work could potentially replace Takaya's own official prints in the marketplace, their fan art infringes on Takaya's copyright. In the Second Circuit, however, Blesseii and similarly-situated fan artists have a much better chance of defending their craft, provided their artwork is transformative enough and does not copy too much from the original artist.

The Supreme Court has yet to resolve this circuit split on the importance of transformativeness versus economic impact. There are also no cases in either the Second or Seventh Circuit to guide us on how fair use would apply to commercial fan art. This lack of clarity and guidance on the issue poses a number of problems for those within the fandom community, as explained below.

---

<sup>196</sup> *Id.* at 759. This conclusion could be read as Judge Easterbrook misunderstanding the second factor. The point of the second fair use factor is to determine whether the work itself is the type of artistic, creative work that copyright was intended to protect, as opposed to, say, a factual or utilitarian work. The monetary value of the work should have no bearing on how close it is to the core of intended copyright. But that's another Note for another student to write.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 758.

### B. Legal Risks for Fan Artists and False Feelings of Safety

Despite the general lack of lawsuits between manga artists and their fans, fan artists still have reason to be wary of facing legal action from copyright holders. A sense of complacency may come from the fact that copyright holders will not often sue fans for infringement, as they do not want to harm their relationships with their fans or risk negative publicity.<sup>199</sup> Some authors will even encourage fans to engage with their copyrighted content, as such engagement can be economically beneficial for the copyright holder. The most well-known example of this occurred when the original *Star Trek* television series was cancelled for poor ratings, only to be brought back into the mainstream by female fans who went to conventions and exchanged fanfiction depicting a romantic relationship between Kirk and Spock.<sup>200</sup> On the other side of the Pacific, anime and manga fans are rarely sued by copyright holders because Japan is culturally a less litigious society than the United States.<sup>201</sup> Japanese animation studios in particular tend to avoid lawsuits due to their tight budgets and fear of alienating fans.<sup>202</sup> Manga artists often start their own careers by selling doujinshi of other artists' characters, another possible reason why they may not pursue legal action

---

<sup>199</sup> See, e.g., Morgan Drake, "It's Dead Jim!"—Fair Use in Fanworks Without Precedent, 27 DEPAUL J. ART TECH. & INTELL. PROP. L. 199, 222–23 (2017) (discussing the steps Paramount Pictures took to protect its image during its lawsuit against Axanar Productions). Disney is a notorious exception to this general principle, as the company is known to aggressively protect its copyrights. In a recent example, the company tried to fine an elementary school for screening *The Lion King* during a fundraiser. Christie D'Zurilla, *Some Dads Screened 'The Lion King' at a School Fundraiser. Now Disney is the Bad Guy*, L.A. TIMES (Feb. 7, 2020), <https://www.latimes.com/entertainment-arts/business/story/2020-02-07/disney-pta-licensing-lion-king> [perma.cc/W3VQ-U4KP]. The company was also an influential lobbyist for the Sonny Bono Copyright Term Extension Act of 1998, presumably because the company wanted to prevent *Steamboat Willie*, the first Disney short film to contain Mickey Mouse, from falling into the public domain. Steve Schlackman, *How Mickey Mouse Keeps Changing Copyright Law*, ARTREPRENEUR (Feb. 15, 2014), <https://alj.artrepreneur.com/mickey-mouse-keeps-changing-copyright-law/> [perma.cc/3QKJ-E8M9].

<sup>200</sup> See, e.g., Jessica Litman, *Creative Reading*, 70 LAW & CONTEMP. PROBS. 175, 175–76 (2007).

<sup>201</sup> The difference is profound despite Japan being a civil society like the United States. See Lee, *supra* note 143, at 186; *infra* Section I.D.

<sup>202</sup> Lee, *supra* note 143.

against fans.<sup>203</sup> For these reasons, many Artists' Alley vendors probably feel that they have no reason to fear manga artists or anime production companies bringing legal action against them.<sup>204</sup>

However, even though these kinds of lawsuits are uncommon, they occur more often than fan artists realize. Recall *Paramount Pictures v. Axanar Productions*,<sup>205</sup> in which Paramount prevented a fan from producing his own *Star Trek* movie. Similarly, in *Warner Bros. v. RDR Books*,<sup>206</sup> a *Harry Potter* fan was barred from publishing his own encyclopedia on the series. In another example, Japanese video game developer Square Enix sent a cease-and-desist letter to a fan distributing 3D-printed models of the *Final Fantasy* video game characters.<sup>207</sup> Nintendo, the copyright owner of the popular Japanese gaming and anime franchise *Pokémon*, sent a cease-and-desist letter to a fan to bar her from distributing patterns for 3D prints of a planter based on the character Bulbasaur.<sup>208</sup> Finally, the copyright holder of the *Conan the Barbarian* franchise hit fan Ricardo Sanchez with an injunction that prevented him from selling homemade models of the *Conan* characters online.<sup>209</sup>

Thanks to large Japanese production companies, there is also increased pressure on the Japanese government to crack down on international copyright infringement of anime and manga.<sup>210</sup> The Japanese Ministry of Economy, Trade, and Industry ("METI") recently launched the Manga Anime Guardians Project ("MAGP"), an effort

---

<sup>203</sup> *Id.* at 188.

<sup>204</sup> See *infra* Section I.B for an elaboration on Japanese copyright holders' tendencies not to sue fans.

<sup>205</sup> See *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506 (C.D. Cal. Jan. 3, 2017).

<sup>206</sup> See *Warner Bros. Ent., Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008).

<sup>207</sup> Nick Statt, *Print Chop: How Copyright Killed a 3D-Printed Final Fantasy Fad*, CNET (Aug. 16, 2013), <https://www.cnet.com/news/print-chop-how-copyright-killed-a-3d-printed-final-fantasy-fad/> [perma.cc/DM9U-FW2Y].

<sup>208</sup> James Plotkin, *Gotta Catch 'Em All: Nintendo Pulls the Plug on 3D Printed Pokémon Planters*, LINKEDIN (Aug. 19, 2014), <https://www.linkedin.com/pulse/20140819145724-43330467-gotta-catch-em-all-nintendo-pulls-the-plug-on-3d-printed-pok%C3%A9mon-planters/> [perma.cc/35TT-88Q5].

<sup>209</sup> See *Conan Props. Int'l LLC v. Sanchez*, No. 1:17-cv-00162, 2018 WL 3869894 (E.D.N.Y. Aug. 15, 2018). The court did not conduct a fair use analysis of Sanchez' models in this case, perhaps because Sanchez did not assert the defense. See *id.*

<sup>210</sup> Schendl, *supra* note 17, at 632–33.

to combat illegal torrenting (downloading) of anime and manga from YouTube and MegaUpload.<sup>211</sup> The project launched a website containing links to legally accessible anime and manga in response to the \$5.6 billion loss the industry suffers every year due to torrenting.<sup>212</sup> This measure has been criticized on multiple fronts. The website's English translation is poorly written, and many popular anime and manga titles are missing from the website.<sup>213</sup> The MAGP has also been criticized for its potential breadth: although the official goal of the MAGP is only to prevent torrenting of anime and manga, some manga artists, including Ken Akamatsu, have expressed concerns that METI's attempts to crack down on copyright infringement will negatively impact the creation of fan works and destroy the doujinshi industry.<sup>214</sup> Even though MAGP currently only targets torrenting and has been largely unsuccessful, METI's steps toward cracking down on this form of copyright infringement may ultimately lead to greater efforts to block other forms of infringement, including the creation of fan works.<sup>215</sup> Although torrenting is a much more direct form of copyright infringement, the fact that manga artists such as Akamatsu have felt the need to speak out shows that there is a reasonable concern METI will eventually impose restrictions on other, less direct forms of copyright infringement.

Because of METI's recent attempts to restrict copyright infringement, production companies' attempts to more strongly protect their intellectual property, and the recent cease-and-desist letters sent out by Square Enix and Nintendo, American anime fans should begin to question the legality of their artwork and whether they can continue to sell this artwork for profit at conventions. Parent companies in both the United States and Japan have begun taking legal action against copyright infringers.<sup>216</sup> According to intellectual property attorney and blogger Seth C. Polansky, the problem for many of these fans is that "[a]rtists often rely on selling such work

---

<sup>211</sup> *Id.* at 645–46.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 647–48.

<sup>214</sup> *See id.* at 646–47.

<sup>215</sup> *See id.*

<sup>216</sup> *See supra* notes 205–209 and accompanying text.

to make ends meet.”<sup>217</sup> One could simply tell fan artists they should just get a license from the copyright owner, or sell other types of artwork. Although licensing would be the ideal solution, it is not often a realistic one for American anime fans: most Americans do not speak Japanese,<sup>218</sup> and only about 10% of Japanese natives are believed to be fluent in English.<sup>219</sup> This language barrier is a very high transaction cost that would prevent negotiations of effective licensing deals between manga artists, anime production companies, and their fans.

Even though licensing is not a viable option in this scenario, that should not be a reason to completely block the creation of fan art. The goal of the IP Clause is “to promote the progress of science and the useful arts,” which includes the creation of more artistic works.<sup>220</sup> As Justice William Story once eloquently wrote:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.<sup>221</sup>

American copyright law should encourage the creation of new works because that is the purpose of the IP Clause, and achieving this purpose often requires some borrowing from previous works. From a commercial perspective, fans should be able to choose whether they want to financially support manga artists or anime production companies by buying officially licensed artwork, or local artists by buying fan art. Many fans are often unsatisfied with the official and licensed merchandise available for their consumption.<sup>222</sup>

---

<sup>217</sup> Johnston, *supra* note 12.

<sup>218</sup> As of 2000, less than 500,000 Americans could speak Japanese. *See The Japanese Language*, ASIA SOCIETY, <https://asiasociety.org/education/japanese-language> [perma.cc/K3N7-LSYA].

<sup>219</sup> *See How Widely Spoken is English in Japan?*, HOW WIDELY SPOKEN, <https://howwidelyspoken.com/how-widely-spoken-english-japan/> [perma.cc/4VXA-GG9T].

<sup>220</sup> U.S. CONST. art. I, § 8, cl. 8; Agnetti, *supra* note 12, at 132.

<sup>221</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994) (quoting *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436)).

<sup>222</sup> Chung, *supra* note 8, at 401.

This leaves a gap in the marketplace that fan artists can fill.<sup>223</sup> Specifically, unauthorized fan artists can create customizable merchandise that is unlike the official merchandise and satisfies the needs of the consumer.<sup>224</sup> As companies grow larger and become more protective of their intellectual property, fan artists become increasingly at risk of legal attempts to block the sale of their art. Because of the recent measures taken by large Japanese companies to crack down on alleged copyright infringement, the possibility that fan artists will eventually face legal action is no longer a remote one. Fan artists can no longer assume that they won't wake up to a cease-and-desist letter in their mailbox just because the copyright holder is on another continent.

*C. Restraining Fan Artists' Creativity: Online Attorneys' Advice*

If a fan artist ever does question the legality of her craft, she may first turn to Google for answers to basic questions regarding copyright law. Most fan artists cannot afford legal representation, and are therefore unlikely to know what legal protections are available to them and their works.<sup>225</sup> Luckily for them, a number of attorneys have written blog posts and articles advising fan artists on the best courses of action they can follow. This advice is meant to help fan artists avoid copyright infringement and, subsequently, the stresses of legal action. However, most of the easily-accessible advice available to fan artists is also highly discouraging and contradictory.

For the most part, articles and blog posts written by practicing attorneys encourage artists to avoid creating fan art completely. In an article on LinkedIn, copyright and art law attorney Michelle Kennedy warns fan artists that the commerciality of their works may make them a target and advises them to get written permission from the copyright holder before selling their works.<sup>226</sup> She does

---

<sup>223</sup> *Id.*

<sup>224</sup> *See id.* at 401–03.

<sup>225</sup> *See, e.g.,* Patrick McKay, *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century*, 24 REGENT U.L. REV. 117, 144 (2011).

<sup>226</sup> Michelle Kennedy, *5 Copyright Rules for Comic Con Fan Artists*, LINKEDIN (June 28, 2016), <https://www.linkedin.com/pulse/5-copyright-rules-comic-con-fan-artists-michelle-kennedy/> [perma.cc/L8G7-WDPK].

acknowledge that fair use might be able to protect artists, but simply tells artists to seek legal counsel for advice on how fair use would apply in their specific situations.<sup>227</sup> However, due to the current circuit split on the importance of transformativeness, it is difficult for attorneys to adequately advise their clients on how fair use may be used to protect fan art: fan artists may have a better time under a *Cariou* regime, where the focus is on transformativeness, than under a *Kienitz* regime, where the focus is economic. This is especially problematic because, for many artists, this reliance on fair use is all they have to shield themselves from legal liability, given that the language barrier between the United States and Japan is a high transaction cost for artists trying to get written permission to create derivative fan art. Fan artists may not even be able to have a lawyer explain to them how they can assert a fair use defense because, again, most of these artists cannot afford legal representation. This lack of access to licensing and legal representation only highlights the importance of a clear explanation of how the fair use defense may be applied to fan art.

Kennedy at least takes a kind tone in her approach to try and help fan artists navigate the legal scheme. Seth Polansky, in private blog posts<sup>228</sup> and an article ghost-written for *Bleeding Cool*,<sup>229</sup> has not minced words in giving advice to artists and fans in connection to what he calls the “ridiculousness” of Artists’ Alleys.<sup>230</sup> Polansky instructs artists not to sell their artwork without licenses, and tells convention-goers not to buy art that they believe is possibly infringing.<sup>231</sup> This approach does not acknowledge that, as a defense, fair use must be established on a case-by-case basis. It is dangerous to make overbroad assumptions as to which works are protected and which works are not. Anime and manga fan artists are unlikely to be able to obtain a license from Japanese authors given the language barrier, and consumers are unlikely to stop buying fan art just

---

<sup>227</sup> *Id.*

<sup>228</sup> See Seth Polansky, *A Fair(y) Use Tale*, THE LAW OFFICES OF SETH POLANSKY, LLC (Jan. 13, 2016), <http://www.sethpolansky.com/2016/01/13/a-fairy-use-tale/> [perma.cc/3F5S-TXTV].

<sup>229</sup> Johnston, *supra* note 12. This article was ghost-written by Polansky.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

because it might be illegal. If a consumer sees an art piece for sale at a convention and likes it, he is probably going to buy it regardless of the legal consequences.

Another problem with these internet responses is the prevalence of contrary information. Take, for example, the issue of whether art styles are copyrightable. Although this question has not been answered by the Supreme Court, a number of federal courts have hinted that copying an artist's art style can at least be indicative of substantial similarity.<sup>232</sup> However, a Google search brings up conflicting information on this topic. The general counsel of *DeviantArt*, during a panel at the San Diego Comic-Con, implied to his audience that particularly distinct art styles, such as that of *Calvin and Hobbes*, are copyrightable.<sup>233</sup> However, artist-turned-attorney Greg Kanaan argues otherwise in a blog post asserting that an artist who draws *Star Wars* characters in the *Calvin and Hobbes* style will most likely not be found liable for infringement.<sup>234</sup> This conflicting counsel could confuse and frustrate artists who simply want to know whether they can keep selling their fan art. This confusion arguably arises from the conflicting nature of the underlying law: due to a circuit split on the importance of transformativeness and a lack of guidance from the Copyright Act or the Supreme Court on how to apply the fair use defense to fan art, lawyers simply are not sure how to counsel fan artists.<sup>235</sup> Consequently, artists may hesitate to produce any fan art out of fear of legal repercussions. This would be contrary to the IP Clause's goal of encouraging the creation of works.

#### D. Anime Convention Policies

The lack of guidance from the Supreme Court and the lack of uniformity among the circuit courts has impacted how anime conventions themselves deal with the issue of potential copyright

---

<sup>232</sup> See *supra* Section I.B.3.

<sup>233</sup> DeviantArt.com, *DeviantArt Conventions | Fan Art Law at Comic-Con (SDCC 2012)*, YOUTUBE (Sept. 10, 2012), <https://www.youtube.com/watch?v=xKBsTUjd910> [perma.cc/QCC7-WG5A].

<sup>234</sup> Greg Kanaan, *You Can't Copyright Style*, THE LEGAL ARTIST (Feb. 1, 2016), <https://www.thelegalartist.com/blog/you-cant-copyright-style> [perma.cc/YW83-6NEK].

<sup>235</sup> See *supra* Section I.C.4.



infringement. Under current American copyright law, anime conventions may be held secondarily liable as third-party infringers if they permit or encourage the sale of illegal fan art.<sup>236</sup> Third-party infringers may be held liable if they either (1) knowingly assist or encourage infringement (known as “contributory liability”) or (2) benefit from the infringement, while simultaneously having the right or authority to prevent the infringement (known as “vicarious liability”).<sup>237</sup>

The organizations that run anime conventions could theoretically be held liable under either theory of secondary liability. In *Fonovisa v. Cherry Auction*,<sup>238</sup> the plaintiff copyright owner of various music recordings sued Cherry Auction, a flea market, for allowing its vendors to sell counterfeit recordings of the music on the market’s premises.<sup>239</sup> The Ninth Circuit noted that for a party to be found vicariously liable under the Copyright Act, actual knowledge of the infringement is not required. The only two requirements are that (1) the defendant could control the actions of the third-party vendors, and (2) the defendant obtained a direct financial benefit from the infringement.<sup>240</sup> Cherry Auction could control its vendors’ activities while they were on the premises as well as remove vendors from the premises for any reason.<sup>241</sup> Although Cherry Auction did not receive a direct commission from the vendors for the sale of the infringing records, the court held that Cherry Auction still obtained a direct financial benefit from the infringement, in the form of “admission fees, concession stand sales and parking fees, all of which flow[ed] directly from customers who want[ed] to buy the counterfeit recordings at bargain basement prices.”<sup>242</sup> For these reasons, Cherry Auction was found vicariously liable for the infringing sales conducted by its third-party vendors.<sup>243</sup> Cherry Auction was also found contributorily liable for the sale of the infringing records

---

<sup>236</sup> See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996).

<sup>237</sup> FROMER & SPRIGMAN, *supra* note 41, at 512–13.

<sup>238</sup> 76 F.3d 259 (9th Cir. 1996).

<sup>239</sup> *Fonovisa*, 76 F.3d at 261.

<sup>240</sup> *Id.* at 262.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 263.

<sup>243</sup> *Id.* at 264.

because the flea market both knew of the infringing sales and contributed to the infringing activity by “providing the site and facilities for known infringing activity.”<sup>244</sup>

Like Cherry Auction and similar flea markets, anime convention operators would very likely be found contributorily and vicariously liable for any copyright infringement conducted by their vendors. It is fairly common knowledge that artists often sell infringing artwork in Artists’ Alleys,<sup>245</sup> so convention operators cannot claim ignorance of the phenomenon. Similar to Cherry Auction, convention operators contribute to the infringement by providing a venue and facilities for artists to sell their wares. Convention operators would therefore be held contributorily liable for the sale of any fan art that is found to be illegal—in other words, those which are not protected by a fair use defense. These convention operators could also be held vicariously liable, even if they were unaware of the infringing activity, because they have the right to exercise control over the vendors and, according to the holding in *Fonovisa*, they obtain a direct financial benefit from the infringing activity through the sale of badges, which allow admission into convention spaces and access to Artists’ Alleys.

Although the law is clear that convention operators may be held secondarily liable for copyright infringement, the law is less clear on when infringing artwork may be protected under a fair use defense. In other words, there is no clear guidance on how convention operators can protect themselves from secondary liability if they are not sure how to spot illegally infringing artwork in the first place.<sup>246</sup> The inconsistency in anime convention policies regarding the sale of fan art is indicative of this lack of clarity and guidance from the current caselaw and the Copyright Act. This Note will look at the policies of three particular anime conventions as examples: Otakon, Katsucon, and AnimeNYC.

---

<sup>244</sup> *Id.* (citing *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59 (3rd Cir. 1986)).

<sup>245</sup> *See* Johnston, *supra* note 12.

<sup>246</sup> Even works that are technically infringing can still be legal under the fair use defense; *see, e.g.*, *Suntrust v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

Otakon occurs every summer in Washington, D.C.<sup>247</sup> The convention admits fan artists into its Artists' Alley every year based on an application process, then charges the accepted applicants fees for the ability to set up booths where they can sell their artwork.<sup>248</sup> The convention's rules explicitly ban the sale of "any work with copyrighted materials...regardless of whether or not the work is original."<sup>249</sup> At first, this seems to be a total ban on fan art. However, Otakon's policy lays out a specific set of rules directly addressing the sale of fan art. Under this policy, "if a piece of art appears to be very similar to a licensed, copyrighted, etc. piece of art, the artist may be asked to remove it from display and sale at the discretion of the Director or Department Head [of the Artists' Alley]."<sup>250</sup> Another rule Otakon has established for Artists' Alley vendors is that fan art may not take up more than 50% of a vendor's display.<sup>251</sup> It is unclear what Otakon hopes to accomplish with this rule, since the convention would face secondary liability regardless of how much infringing fan art is sold at the convention. The author of this Note can also say from personal experience that this rule is not always followed: she has attended Otakon in the past, and has seen booths in Otakon's Artists' Alley whose displays consisted of mostly, if not entirely, fan art.

Katsucon is another anime convention that occurs annually, usually during the winter, in National Harbor, Maryland.<sup>252</sup> Like Otakon, Katsucon requires its prospective vendors to apply and then pay for a display table if accepted.<sup>253</sup> Regarding fan art, Katsucon appears to try and shift all responsibility onto the fan artist by establishing that "the artist bears all responsibility and risk for the items brought for sale at Katsucon."<sup>254</sup> The policy also states that none of

---

<sup>247</sup> See OTAKON, <https://www.otakon.com/> [perma.cc/7RFD-HN8D]. The 2020 convention was cancelled due to concerns surrounding the COVID-19 pandemic. *See id.*

<sup>248</sup> *Artist Alley Rules*, OTAKON, <https://www.otakon.com/exhibits/alley/rules/> [perma.cc/3RT6-9HGE].

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> See KATSUCON, <https://www.katsucon.org/> [perma.cc/SNZ2-KV4Z].

<sup>253</sup> *Katsucon Artist Alley Rules*, KATSUCON, <https://www.katsucon.org/exhibits/artist-alley/artist-alley-rules/> [perma.cc/AUQ4-ADBD].

<sup>254</sup> *Id.*

the Katsucon staff who patrol Artists' Alley are "legal professional[s] qualified to enforce, for any person or company, what is 'fair use' under the legal concepts such as, but not limited to, parody, homage, and derivative work. Please don't ask us."<sup>255</sup> Respectfully, this approach is unwise because a court would most likely hold Katsucon secondarily liable for copyright infringement, regardless of the convention's attempts in its policy to shift responsibility to the fan artist alone. Unlike Otakon, Katsucon does not limit how much fan art vendors may display.

The third convention, AnimeNYC, is a fairly new convention that has taken place in New York City annually since 2017.<sup>256</sup> AnimeNYC's policy warns fan artists that fan art must be sold in Artists' Alley, rather than alongside licensed merchandise in the exhibit hall (though, interestingly, Japanese doujinshi is allowed to be sold in the exhibit hall).<sup>257</sup> For vendors in AnimeNYC's Artists' Alley, the sale of fan art is explicitly permitted, though any artwork that reproduces official art or another fan's art is prohibited.<sup>258</sup> Another restriction is that fan art may not be mass-produced for sale at AnimeNYC: fan-made merchandise that is not limited in nature "may be considered bootleg merchandise and subject to removal."<sup>259</sup> AnimeNYC's policy does not acknowledge any sort of secondary liability the convention may face for fan artists' copyright infringement.

None of these three conventions provide sufficient guidance or protection for fan artists due to their lack of uniformity. The problem is that, without clear guidance from the law, convention operators may not know the best way to draft these policies. There have been no relevant or significant court cases to this issue since *Fonovisa* in 1996, which was handed down around the same time that most anime conventions were starting to form.<sup>260</sup> This means that the

---

<sup>255</sup> *Id.*

<sup>256</sup> See ANIMENYC, <http://animenyc.com/> [perma.cc/6ALC-YDBF].

<sup>257</sup> *Policies*, ANIMENYC, <http://animenyc.com/policies/> [perma.cc/9TTP-8GZU].

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> The first anime convention in the United States is generally believed to be Yamatocon, which was held in 1983 and only attracted 100 guests. Dallas Middaugh, *The Growth of*

*Fonovisa* ruling is, and always has been, the best court decision for anime convention operators. Unlike *Fonovisa*, however, the fair use question surrounding fan art is much more complicated. *Fonovisa* dealt with an issue of counterfeit music recordings, a very direct form of copyright infringement that almost never qualifies as fair use.<sup>261</sup> But what about fan art? As a type of derivative work, fan art is putatively infringing under the Copyright Act. However, the question of liability for conventions still turns on whether the artist herself can assert a viable fair use defense. Do courts look to the *Cariou* approach and focus on the transformativeness of the derivative work, or do they instead follow the *Kienitz* approach? Without a solution to this circuit split, fan artists and convention operators have no way of knowing when they can be held liable for copyright infringement, either directly or secondarily.

The sale of fan art at conventions brings in significant revenue for both the artists and the convention operators.<sup>262</sup> In 2014, approximately 67% of artwork sold at large anime conventions was fan art.<sup>263</sup> Fan artists at these conventions were able to earn gross

---

*Anime Events*, LINKEDIN (June 13, 2019), <https://www.linkedin.com/pulse/growth-anime-events-dallas-middaugh> [<https://perma.cc/PZG6-QKWL>]. During this time, the main attraction of anime conventions was not merchandise or fan art, but rather viewing rooms that provided fans a rare opportunity to actually watch anime. *Id.* The first anime convention in the United States to attract more than 1,000 guests was AnimeCon (a predecessor to AnimeExpo, currently the largest anime convention in the world outside of Japan) in 1991. *Id.* Otakorp, Inc., the non-profit behind Otakon, did not begin hosting events at the Baltimore Convention Center until 1999. Lauren Orsini, *20 Facts About Otakon 20*, OTAKU USA MAGAZINE (Aug. 15, 2013), <https://otakuusamagazine.com/20-facts-about-otakon-20/> [<https://perma.cc/S8EU-MSP4>].

<sup>261</sup> See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 261 (9th Cir. 1996).

<sup>262</sup> One contributor to an online forum, who claimed to be a vendor at Otakon in 2017, discussed the convention's policy on fan art as follows: "They have a 50/50 rule on fanart and original art, which, as someone else pointed out, unless you are an established artist with a huge fanbase, just bank on half of your products not selling." KA, *Nightmare*, Comment on *Otakon*, ARTISTS ALLEY CONFIDENTIAL (Aug. 16, 2017, 6:31 PM), <https://www.artistsalleyconfidential.com/conventions/otakon/> [<https://perma.cc/3SLN-VRFL>]. Another vendor lamented: "The overhead is ridiculously high. \$200 minimum if you want to sell fan-art (which is practically the only thing that sells at shows like this) and your table does not include badges, which add another \$80-\$100 per person." BJK, *Avoid Like the Plague*, Comment on *Otakon*, ARTISTS ALLEY CONFIDENTIAL (Aug. 16, 2017, 6:31 PM), <https://www.artistsalleyconfidential.com/conventions/otakon/> [<https://perma.cc/3SLN-VRFL>].

<sup>263</sup> KIRISKA, *supra* note 9.

revenues from selling 2D artwork as high as \$7,900 per convention.<sup>264</sup> Without the ability to sell fan art at these conventions, artists would lose significant revenue and would lose interest in paying conventions for the space to sell their wares.<sup>265</sup> Any sort of total ban on fan art at anime conventions would not only be financially harmful to the artists, but to the conventions as well. Otakon charges artists a flat rate of \$325 per booth in its Artists' Alley.<sup>266</sup> If an artist knew she could not sell fan art at her booth, she likely would not want to pay this fee, since she would have a much harder time turning a profit.<sup>267</sup> To protect the economic interests of fan artists and convention operators, the law needs to state more clearly which types of fan art may be protected under a fair use defense.

### E. Academic Literature

While many legal academics have written about copyright issues surrounding fan works and have tried to advocate for broader legal protection for fan artists, there is a gap in the literature on the legal protections that should be available for the commercial sale of fan art. Most scholarly pieces on this topic focus on either commercial works or other types of fan works besides PGS.<sup>268</sup> Fanfiction, for instance, occupies a majority of the literature.<sup>269</sup> Rebecca Tushnet, the Frank Stanton Professor of the First Amendment at Harvard Law School and a co-founder of the Organization for Transformative Works, is one of the leading academics in this field.<sup>270</sup> She has focused much of her writing on literary fan works, rather than PGS

---

<sup>264</sup> *Id.*

<sup>265</sup> See Chung, *supra* note 8.

<sup>266</sup> This \$325 rate is only for a standard table. More established artists can apply to purchase either a “pro row booth” for \$775 or an “unlimited booth” for \$1,100. See *Artist Alley Rules*, OTAKON, <https://www.otakon.com/exhibits/alley/rules/> [perma.cc/3RT6-9HGE].

<sup>267</sup> See *supra* notes 222–223 and accompanying text.

<sup>268</sup> See *supra* note 167.

<sup>269</sup> See *supra* note 167.

<sup>270</sup> The Organization for Transformative Works is “a non-profit dedicated to supporting and promoting fanworks.” See Rebecca Tushnet, HARVARD LAW SCHOOL, <https://hls.harvard.edu/faculty/directory/11412/Tushnet> [https://perma.cc/4PY3-W66B].

works.<sup>271</sup> She acknowledged that fanfiction has dominated the legal scholarship on fandom culture in an article dated 2007,<sup>272</sup> and this appears to still be the case over thirteen years later.<sup>273</sup> This focus on fanfiction in legal academia makes it difficult to assess how fair use should apply to PGS works such as fan art. Certain arguments that scholars apply to fanfiction cannot apply to fan art, because determining the transformativeness of literary works is different from determining the transformativeness of PGS works.<sup>274</sup>

Many scholars also tend to focus on noncommercial fan works, those created for purely recreational purposes. As a result, they do not consider the legal status of fan works sold for profit or, in the case of Professor Tushnet, argue fair use protection only for noncommercial fan works.<sup>275</sup> This focus on noncommercial works could be seen as an extension of the scholarship's focus on fanfiction: because most fanfiction is available for free online, it is noncommercial by nature.<sup>276</sup> This may prevent some scholars from taking into account the stretch of fan works that are commercial,

---

<sup>271</sup> See generally Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007). In *Payment in Credit*, Tushnet focuses much of her analysis on literary fan works, though she also mentions other types of fan works, such as audiovisual works (fan-made videos often called “fanvids”), in the main body of her piece. See *id.* at 156–57. Fan art sold at conventions only receives a cursory reference in a footnote of this piece. See *id.* at 135, n.27. For a companion piece to Tushnet’s article that appeared in the same volume of the same journal, see Litman, *supra* note 200.

<sup>272</sup> See Tushnet, *supra* note 271, at 140.

<sup>273</sup> Other scholarly works that, either explicitly or implicitly, focus their analysis on fanfiction and other forms of literary works include: De Zwart, *supra* note 61; Drake, *supra* note 199; F.E. Guerra-Pujol, *Of Coase and Copyrights: The Law and Economics of Literary Fan Art*, N.Y.U. J. INTELL. PROP. & ENT. L. (forthcoming) (last revised Sept. 17, 2019); Lee, *supra* note 143; Brian Link, *Drawing a Line in Alternative Universes: Exposing the Inadequacies of the Current Four-Factor Fair Use Test Through Chanslash*, 33 T. JEFFERSON L. REV. 139 (2010); Kenneth R.L. Parker, *Gray Works: How the Failure of Copyright Law to Keep Pace with Technological Advancement in the Digital Age Has Created a Class of Works Whose Protection is Uncertain and What Can be Done About It*, 21 J. INTELL. PROP. L. 265 (2014); Romanenkova, *supra* note 59.

<sup>274</sup> See *infra* Section I.A.

<sup>275</sup> See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 654 (1997).

<sup>276</sup> See Drake, *supra* note 273, at 203.

including the PGS works available for sale in Artists' Alleys.<sup>277</sup> Regardless, the various proposed solutions for legalizing certain fan works are discussed below.

### 1. Amending the Copyright Act

One proposed solution to assure the legality of certain fan works is an amendment to the Copyright Act that would explicitly permit the creation of certain types of fan works. Attorney Patrick McKay advocates for such a solution.<sup>278</sup> According to him, copyright holders are overreaching in their attempts to protect their intellectual property, at the expense of the “vibrant new art forms” arising out of fan culture, including fanfiction and fanvids.<sup>279</sup> To protect these fan works and prevent copyright holders from abusing their rights, McKay proposes a series of amendments to the Copyright Act, including one that would “explicitly clarify that non-commercial, transformative works are fair use.”<sup>280</sup> Any derivative work that is transformative and not made for profit would therefore be permissible under American copyright law.

Another proposed amendment to the Copyright Act would change the derivative works provision of the Act to legalize fan works and similar creative works. Kate Romanenkova discusses this proposal in *The Fandom Problem: A Precarious Intersection of Fanfiction and Copyright*.<sup>281</sup> On the possibility of using fair use as a defense to fan works, Romanenkova argues that the fair use test is too ambiguous to effectively protect fan works.<sup>282</sup> According to Romanenkova, one possible amendment to the derivative works doctrine would “redefine ‘derivative work’ as a work that is based on a preexisting copyrighted work that does not significantly transform or recast the work.”<sup>283</sup> Romanenkova notes that this proposed solution would upset licensees who have already obtained licenses

---

<sup>277</sup> Scholarly works that fail to substantially take into account the commercial nature of certain fan works include: De Zwart, *supra* note 61; McKay, *supra* note 225; and Parker, *supra* note 273.

<sup>278</sup> See McKay, *supra* note 225, at 117.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> See Romanenkova, *supra* note 59.

<sup>282</sup> *Id.* at 184.

<sup>283</sup> *Id.* at 205–06.



to create such works<sup>284</sup> and cause confusion in the courts as to how transformative a work must be to be non-infringing.<sup>285</sup> She also argues against amending the derivative works doctrine to allow non-commercial fan works, claiming that this would be problematic for third-party websites that contain such fan works and profit off advertising.<sup>286</sup> This argument also applies to the issue at hand, albeit for different reasons: making an exception for only noncommercial fan art does nothing to protect vendors at anime conventions, who profit off fan artists selling their wares at Artists' Alleys.

## 2. Modifying Fair Use

Brian Link, attorney and former Intellectual Property Fellow at Thomas Jefferson School of Law,<sup>287</sup> wrote a Note proposing his own modification to the fair use analysis during his time as a student.<sup>288</sup> His proposal would modify fair use to account for authors' moral rights by adding a fifth "moral rights" factor to the fair use analysis.<sup>289</sup> Under Link's fifth factor, "if the secondary work mutilates the original, then the courts should find this factor cuts in favor of the copyright owner and against fair use."<sup>290</sup> Link points out an interesting phenomenon within the world of "chanslash," a form of fanfiction that places underage characters in sexually explicit scenarios:<sup>291</sup> "the more distorted the chanslash, the more transformative the secondary work is; the more transformative, the less danger there is of infringing the original work."<sup>292</sup>

The specific chanslash cited by Link takes the characters Lucius and Draco Malfoy, a father-son duo from the *Harry Potter* franchise,

---

<sup>284</sup> *Id.* at 206.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See Brian J. Link, LINKEDIN, [https://www.linkedin.com/in/brianjlink?challengeId=AQG0GHA\\_FOGT2AAAAXTwDKHTWPpMObl4Rf3iDpkVSAA72zkU7p9M1NHIQVgNNIoxQ4L5OvJ6t0pvLMedmJcFlQs8J5mPtXU05w&submissionId=fb8e9ead-dc93-3a16-7dec-1f1bfacbb129](https://www.linkedin.com/in/brianjlink?challengeId=AQG0GHA_FOGT2AAAAXTwDKHTWPpMObl4Rf3iDpkVSAA72zkU7p9M1NHIQVgNNIoxQ4L5OvJ6t0pvLMedmJcFlQs8J5mPtXU05w&submissionId=fb8e9ead-dc93-3a16-7dec-1f1bfacbb129) [<https://perma.cc/P98H-XJC6>].

<sup>288</sup> See Link, *supra* note 273; see Brian Link, *Law Review Unveils New Website*, T. JEFFERSON SCH. OF L. (Apr. 8, 2013), <https://www.tjssl.edu/news-media/2013/9280> [<https://perma.cc/8UV3-2XA8>].

<sup>289</sup> Link, *supra* note 273, at 142.

<sup>290</sup> *Id.* at 174.

<sup>291</sup> *Id.* at 141.

<sup>292</sup> *Id.* at 142.

and has Lucius torturing and sexually abusing his own son.<sup>293</sup> In addition to being morally reprehensible and disturbing, the chanslash also directly contradicts J.K. Rowling’s own wishes that fans of her series refrain from writing sexually-explicit fanfiction.<sup>294</sup> Link compares this story to another fanfiction exploring a secret friendship between Draco and fellow Hogwarts student Hermione Granger, one that keeps in line with Rowling’s wishes but is also less likely to be protected under fair use because it is less transformative than the sexually-explicit chanslash.<sup>295</sup> Under Link’s proposed moral rights factor, authors could claim that their works were “mutilated” by certain kinds of derivative works, such as sexually-explicit fanfiction, and that this mutilation has resulted in non-economic harm to the author.<sup>296</sup> This proposal would diminish the importance of transformativeness in a fair use analysis.<sup>297</sup> To justify the inclusion of a moral rights factor, Link argues:

While not an economic harm, mutilation may harm the integrity of the original and the association to the copyright owner. Authors feel a personal connection to their works and may be harmed in a non-economic way by seeing their characters mutilated and depicted in ways that were never intended in the original works...Non-mutilating works would not pose the same potential harm because they are typically consistent with the style and substance of the original works.<sup>298</sup>

---

<sup>293</sup> See *id.* at 139; see also Rob Bricken, *Draco and Lucius Malfoy in ‘Squick,’* TOPLESS ROBOT (Nov. 20, 2009), [http://www.toplessrobot.com/2009/11/fan\\_fiction\\_friday\\_draco\\_and\\_lucius\\_malfoy\\_in\\_squi.php](http://www.toplessrobot.com/2009/11/fan_fiction_friday_draco_and_lucius_malfoy_in_squi.php)

[<https://perma.cc/8C6D-S4KC>] (WARNING: This story contains elements of pedophilia, incest, sexual abuse, and necrophilia. Exercise caution if you choose to view this source.).

<sup>294</sup> See Link, *supra* note 273, at 177; see Romanenkova, *supra* note 273, at 209 (discussing Rowling’s request that *Harry Potter* fanfiction remain noncommercial and “not obscene”).

<sup>295</sup> See Link, *supra* note 273, at 140–41. The fanfiction referenced by Link, *A Rose for Hermione* by user CaspianMiraz24, has since been taken down from fanfiction.net.

<sup>296</sup> See *id.* at 174.

<sup>297</sup> See *id.*

<sup>298</sup> See *id.* at 177.

Link's fifth factor would consequently counter the transformative nature of the morally reprehensible chanslash, placing it on equal footing with fanfiction that is less transformative but more in line with Rowling's wishes.<sup>299</sup>

### 3. The First Amendment Argument

Attorney Melissa Anne Agnetti argues that the Copyright Act, as courts currently enforce it, sits in tension with the First Amendment's protection of free speech.<sup>300</sup> She draws examples from fan works to show that "while copyright promotes the advancement of literary and artistic works through the endowment of exclusive rights, this interferes with the most important objective of the First Amendment in allowing for unconstrained speech to promote individual autonomy."<sup>301</sup> Unlike most other academics in this field, Agnetti acknowledges that a lot of fan art is sold at conventions and that it is a highly popular form of media.<sup>302</sup> She also acknowledges the Copyright Act's tension with the First Amendment, noting that by granting certain rights to copyright holders, the Act restricts fans' rights to free speech because they cannot create derivative artwork as they please.<sup>303</sup> Courts do not currently recognize the First Amendment as a separate defense under the Copyright Act because First Amendment protections are supposedly built into the Copyright Act already: the fair use doctrine and the idea/expression dichotomy.<sup>304</sup> Agnetti disagrees with this view; according to her, copyright law is meant to protect against blatant plagiarism and real or potential harm to authors' market shares, but "fandom activities, for the most part, do neither."<sup>305</sup>

---

<sup>299</sup> *See id.*

<sup>300</sup> *See Agnetti, supra* note 12, at 118.

<sup>301</sup> *See id.*

<sup>302</sup> *See id.* at 126.

<sup>303</sup> *See id.* at 132–33.

<sup>304</sup> *See id.* at 134 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003)). The idea-expression dichotomy sets forth that "copyright protection for an original work of authorship [does not] extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b). In other words, although expressions of ideas may be copyrightable, the underlying ideas are not. *See Erickson v. Blake*, 839 F. Supp. 2d 1132, 1469 (D. Or. 2012).

<sup>305</sup> Agnetti, *supra* note 12, at 140.

Agnetti acknowledges that fan-made products often fill gaps in the marketplace left by copyright owners.<sup>306</sup> She extrapolates on arguments made by attorney Christina Chung in her student Note, which states that “[s]ince fans have a better understanding of what their fandom is looking for, more so it seems than the copyright owners themselves, it is highly probable that they would be better equipped to respond to the market.”<sup>307</sup> However, current copyright law protections prevent fans and other creative individuals from “writing, painting, publicly performing, or otherwise communicating what [they] please.”<sup>308</sup> Agnetti argues that courts should allow defendants in copyright litigation to raise First Amendment defenses, which would compel the courts to apply a traditional analysis of whether the copyright statute in question is “justified by a compelling governmental interest” and uses “the least restrictive means necessary in order to achieve that interest.”<sup>309</sup>

Agnetti also discusses the Ninth Circuit decision *Walt Disney Productions v. Air Pirates*, explained earlier in connection with *Steinberg*.<sup>310</sup> Agnetti analyzes *Air Pirates*’ comics as a type of fan art, and considers the court’s ruling in Disney’s favor an assault on First Amendment rights.<sup>311</sup> Agnetti’s proposal would protect multiple kinds of derivative works, even those that borrow heavily from the source material like the *Air Pirates* comics, based on the idea that the authors of these derivative works are entitled to free speech, and that current copyright law is too restrictive of that free speech right.<sup>312</sup> Agnetti claims her proposed First Amendment defense would prevent the “chilling” of free speech, and would force courts to take a closer look at whether copyright law restricts more speech than is essential.<sup>313</sup>

---

<sup>306</sup> *Id.* at 161.

<sup>307</sup> *Id.* at 162 (citing Chung, *supra* note 8, at 401).

<sup>308</sup> *Id.* at 132–33 (quoting Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165–66 (1998)).

<sup>309</sup> *Id.* at 133.

<sup>310</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978). For Agnetti’s discussion of the case, see Agnetti, *supra* note 12, at 145–46; see also *supra* notes 96–100.

<sup>311</sup> Agnetti, *supra* note 12, at 146.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 158.

## III. HOW TO GIVE ARTISTS CLARITY ON COPYRIGHT

A. *The Inadequacy of Current Proposed Solutions*

The solutions proposed above by various attorneys and scholars would not adequately protect both authors and fan artists. Fan art as a concept, being a socially acceptable form of copying and potential infringement, is so unique from other transformative and derivative PGS works that the legal problems surrounding fan art require a unique solution. McKay's proposed amendment—which would make noncommercial, transformative works fair use—would do nothing for commercial transformative works, such as those sold in Artists' Alleys.<sup>314</sup> In a similar vein, the amendments to the derivative works doctrine discussed by Romanenkova would only protect derivative works that are either (1) highly transformative, or (2) not made for economic gain.<sup>315</sup> Romanenkova, however, fails to identify a means of measuring how much transformativeness is necessary to protect a fan-made work,<sup>316</sup> and like McKay's, her solution would not protect commercial fan works.

Romanenkova also argues against extending legal protection to commercial fan works under the fair use doctrine, claiming that the doctrine is already “bloated” and “would not solve the legitimate concern some authors have about others producing unwanted derivative works.”<sup>317</sup> Even though extending the fair use doctrine may produce such unwanted derivative works, the main goal of the IP Clause of the Constitution is to encourage the creation of more works, to “promote the progress of science.”<sup>318</sup> A tradeoff to accomplishing this goal is that, on occasion, people will create derivative works that the authors dislike. The fair use defense exists to allow acceptable uses of copyrighted works or the creation of derivatives that are transformative and do not threaten the holder's economic

---

<sup>314</sup> See *supra* Section III.A.

<sup>315</sup> Romanenkova, *supra* note 59, at 205–06; see also *supra* Section II.E.1.

<sup>316</sup> Romanenkova, *supra* note 59. In her conclusion, Romanenkova concedes that she is unable to provide a single solution to the fandom issue, but rather claims that “[s]ome combination of the solutions presented [in her article] would be best if the rights of both fans and authors are considered.” *Id.* at 212.

<sup>317</sup> *Id.* at 207.

<sup>318</sup> U.S. CONST. art. I, § 8, cl. 8; Agnetti, *supra* note 12, at 132.

interests.<sup>319</sup> The defense does not exist to restrict unacceptable use—that is the purpose of the holder’s exclusive rights. Romanenkova argues that fair use protects too much already.<sup>320</sup> However, the only case she provides to support this argument is *Authors Guild v. Google*,<sup>321</sup> which held that Google’s digitization of copyrighted books for its library project was protected under fair use.<sup>322</sup> She does not point to any cases in which fair use unjustifiably protected a derivative work. Finally, like McKay, Romanenkova does not consider the legality of commercial fan works specifically, incorrectly stating that fan works are “created with no expectation of profit.”<sup>323</sup> As the existence of Artists’ Alleys proves, this is simply untrue. Both McKay’s and Romanenkova’s solutions are of no help in this situation since they would not extend protection to commercial fan works.

Link’s proposed fifth fair use factor, which would protect against the non-economic harm caused by mutilation of an author’s work, has two problems of its own. First, Link does not give a clear definition of “mutilate.” The example he provides, detailing a sexually explicit and incestuous *Harry Potter* fanfiction, is an easy case,<sup>324</sup> but applying this fifth factor could become more challenging in situations where “mutilation” of the copyrighted work is not as obvious. He also does not discuss what mutilation would look like in non-literary works, such as fan art. Should courts analyze the derivative’s art style to find mutilation, or rather the overall content of the piece, or perhaps other factors? The answer is unclear. Another problem with Link’s proposed fifth factor is that it adds no extra protection for commercial works, so like the arguments before, it would not resolve the core problem raised in this Note.

Finally, Agnetti’s proposed expansion of First Amendment protections under copyright law is overbroad. Agnetti’s attitude is that satirical comics like *Air Pirates* should be protected regardless of

---

<sup>319</sup> See 17 U.S.C. § 107; *supra* Section I.C.

<sup>320</sup> See generally Romanenkova, *supra* note 59, at 207.

<sup>321</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 207–08 (2d Cir. 2015).

<sup>322</sup> See *id.*; Romanenkova, *supra* note 59, at 207 n.201.

<sup>323</sup> Romanenkova, *supra* note 59, at 195.

<sup>324</sup> See Link, *supra* note 273, at 176–77.

how much they copy from the source material.<sup>325</sup> This very attitude highlights the issue with Agnetti's argument. As overbroad as copyright protection may be, there remain certain types of derivative works that do not deserve legal protection. In the *Air Pirates* case, the court rejected defendants' argument that their comics were purely satirical:

[D]efendants' copying could have been justified as necessary more easily if they had paralleled closely (with a few significant twists) Disney characters and their actions in a manner that conjured up the particular elements of the innocence of the characters that were meant to be satirized. While greater license may be necessary under those circumstances, here *the copying of the graphic image appears to have no other purpose than to track Disney's work as a whole as closely as possible* (emphasis added).<sup>326</sup>

Agnetti presents the *Air Pirates* case as an example of how fair use fails to protect fan art. In reality, the case is a perfect example of why fair use should be used to protect fan art, rather than the First Amendment. Agnetti herself acknowledges that the Copyright Act should protect against blatant plagiarism. Is directly copying *Steamboat Willie's* iconic art style into one's own version of Mickey Mouse not a form of plagiarism? As the Ninth Circuit implies, and as the court in *Steinberg* would later affirm, art styles are a part of creative expression.<sup>327</sup> Setting aside the literary aspect of *Air Pirates'* comics and focusing only on the defendants' visual appropriation of not just Mickey Mouse, but also his original art style, the defendants take much more than necessary from the original PGS work and fail to transform the character into something new.<sup>328</sup> The purpose of the IP Clause is to encourage the creation of new artistic works. By allowing defendants to protect their derivative works

---

<sup>325</sup> See Agnetti, *supra* note 12, at 146.

<sup>326</sup> *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978).

<sup>327</sup> See generally *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

<sup>328</sup> Because this Note is focused on the legality of PGS fan works, the author is unconcerned with how literary aspects to fan-made comics may alter the fair use analysis.

under the First Amendment, courts would risk granting too much protection to visual artwork that is not actually “new,” but rather just a practical copy of the original creative piece. Artwork that takes everything from the original artist’s expression, including art style, should not be protected by the IP Clause, and *Air Pirates* is an illustration of that.

*B. Solution: Art Style as an Indication of Transformativeness*

The fair use analysis, as it currently stands, is sufficient to protect even commercial fan art that is so transformative it runs no risk of substituting the original art in the marketplace, but rather acts as a complement to the source material. The best way to determine which fan pieces reach this transformativeness threshold is to consider the holdings in both *Cariou* and *Kienitz*, with more weight being given to the *Cariou* approach.<sup>329</sup> On its own, *Kienitz*’s economic-based approach does not apply well to the world of fan art. Most fans already recognize official artwork and fan artwork as being two separate marketplaces: the fact that official artwork is never sold in Artists’ Alleys, while fan art is, is a testament to that. Relying on a *Kienitz*-based approach in copyright cases surrounding fan art would effectively shut down an entire marketplace and area of revenue for artists and convention centers, while the only real winners would *maybe* be the major corporations, assuming they have not already alienated their fanbases through litigation.

Courts should look to *Cariou* to determine whether the derivative work is transformative enough that it takes on a new meaning. Then, courts should take this transformativeness and new meaning into consideration when determining whether the derivative work is distinguished enough that it complements the original artwork in the marketplace. If, however, the derivative work is not highly transformative, but rather borrows from the original work to the point of plagiarism, courts should hold that the derivative work is a substitute for the original and hold the creator of the derivative liable for copyright infringement. This solution favors the *Cariou* approach more than the *Kienitz* approach, since it focuses on transformativeness. It may help to think of this proposed solution as consisting of two

---

<sup>329</sup> See *supra* notes 187–193 (comparing the holdings in *Cariou* and *Kienitz*).



steps: (1) address the issue of the fan art's transformativeness under the first factor, then (2) take transformativeness into consideration when addressing the issue of market substitution under the fourth factor. This question of transformativeness was not as much of an issue in *Kienitz* because the putatively infringing work, a t-shirt design, directly utilized the copyrighted photograph of the politician; the design did not have the same level of creative input that derivative works often have.<sup>330</sup>

As applied to fan art depicting anime and manga characters, so long as the fan art portrays characters in an art style that is sufficiently distinct from the original manga artist's or anime production company's style, then the fan art should be considered transformative enough under the first factor to be fair use. When deciding whether commercial fan art is infringing under the Copyright Act, courts should apply the fair use test as is and also keep in mind the underlying question of whether the fan artist's art style is transformative enough that a reasonable consumer would be able to distinguish the fan art from official artwork. This focus on art style as an indication of transformativeness would apply uniquely to PGS works, rather than other types of fan works. However, contrary to past proposed solutions, this solution would provide greater protection for commercial fan works while simultaneously protecting the copyright holder's moral and economic interests in their own work.

The easiest way to understand this solution is to put it into action. Recall the description this Note gave of Natsuki Takaya's art style earlier: Takaya's characters in the *Fruits Basket* franchise are instantly recognizable for their abnormally large eyes, mostly taken up by the characters' irises; angular facial features; and fairly matte shading.<sup>331</sup> Fans that dislike Takaya's art style may want artwork of her characters drawn in another style. This is where the gap in the marketplace exists. Transformative fan art that portrays Takaya's

---

<sup>330</sup> *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 759 (7th Cir. 2014); *supra* text accompanying notes 125–127. The court also took note of how the t-shirt design was intended as a political commentary, thus weighing the first factor in Defendant's favor. *Kienitz*, 766 F.3d at 759. However, the court places little emphasis on this factor, focusing instead on the amount borrowed from the original photograph and the economic effects of the t-shirt design on the market for the original photograph. *Id.* at 759–60.

<sup>331</sup> See TAKAYA, *supra* note 21.

characters in new and unique art styles should be protected under copyright law. Fan art that copies her style, to the point where fans may confuse the fan art for official artwork, should be barred as infringement. While the former fills a gap in the marketplace for fan art, the latter risks substituting Takaya's work to her detriment. To help further illustrate, this Note will apply this proposal to a fair use analysis of Blesseii's rendition of Tohru Honda, the heroine of *Fruits Basket*.<sup>332</sup> Please note that it is unknown whether Blesseii has actually sold this piece commercially; their work is being used purely as a hypothetical case.



*Blesseii's Honda*

*Takaya's Honda*

### 1. Purpose and Character

The first question to ask under the first fair use factor is whether the fan art is sold for commercial profit. Imagine that Blesseii has decided to sell their rendition of Tohru Honda in an Artists' Alley. This would cut against fair use because fair use tends to favor non-commercial uses of copyrighted works. However, as the Court notes in *Acuff-Rose*, this is not dispositive.<sup>333</sup>

The first factor is also the place to consider the transformative nature of the fan art. Now is when we look at the art style Blesseii

<sup>332</sup> @Blesseii, *supra* note 7.

<sup>333</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 570 (1994).

uses and decide whether it is different enough from Takaya's art style that it transforms the character depicted. Blesseii's version of Honda is immediately recognizable as distinct from Takaya's original rendition of the character. Though both artists use fairly solid coloring, Blesseii uses much bolder colors in their version of Honda, whereas Takaya's color choices are lighter, making the character appear softer. Blesseii also gives Honda circular, more proportional eyes, a stark contrast from the large rectangular eyes Takaya uses. Another noticeable difference between the two versions of Honda is her chin. Takaya's Honda has a soft jawline that ends in a sharp, pointed chin. This has the effect of giving Honda what is essentially a heart-shaped head. Blesseii, on the other hand, gives Honda a more square-shaped head. This effect is accomplished by drawing Honda's jawline as more angular, while also giving her a less pronounced chin.

Looking at the two art pieces overall, Blesseii draws Honda in a cutesy style, while Takaya's is more mature. Although selling this piece of fan art at a convention would make it commercial, the art style is so transformative that, in the words of *Cariou*, "[Blesseii] has not presented the same material as [Takaya] in a different manner, but instead has 'added something new' and presented [Honda] with a fundamentally different aesthetic [citation omitted]."<sup>334</sup> The first fair use factor therefore weighs in Blesseii's favor.

## 2. Nature of the Copyrighted Work

Takaya's artwork of Honda would be classified as a PGS work. These kinds of artistic works are close to the core of intended copyright protection,<sup>335</sup> as opposed to more factual works. For this reason, the second factor automatically weighs in Takaya's favor. Note, however, that this factor is relatively weak compared to the others: the first and fourth factors are still largely considered the most important in a fair use analysis.

---

<sup>334</sup> *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013).

<sup>335</sup> *Campbell*, 510 U.S. at 586.

### 3. Amount and Substantiality

Fan art of a character needs to be recognizable as that character, otherwise it is not very good fan art. This is similar to the Court's rationale in *Campbell v. Acuff-Rose* that a parody naturally needs to borrow some elements from the original source material in order to be an effective parody.<sup>336</sup> Blesseii's fan art is effective in that the character portrayed is easily recognizable as Tohru Honda. Like Takaya's original Honda, Blesseii's Honda has long brown hair and brown eyes. Blesseii also gives their version of Honda the iconic yellow hair ribbons and blue school uniform that make the character instantly identifiable.

Blesseii very clearly borrowed certain elements from Takaya's original portrayal of Honda. However, this borrowing was arguably necessary for Blesseii's fan art to be recognizable and effective. The question remains whether Blesseii borrowed more than necessary to make her portrayal of Honda recognizable. Given the stark artistic differences between Blesseii's Honda and Takaya's Honda, this factor most likely weighs in Blesseii's favor. Blesseii's artwork is recognizable as Tohru Honda, but a Tohru Honda that is clearly different from Takaya's version. This is not a situation like *Air Pirates*, in which the artists copied not only those elements of Mickey Mouse that made him recognizable, but also Disney's exact method of expressing the character.<sup>337</sup> Rather than taking the entirety of Takaya's expression, Blesseii only borrowed those elements that make Honda recognizable; the rest is Blesseii's own creative expression.

### 4. Effect on the Market

The final question is whether, should Blesseii choose to sell their artwork of Honda in an Artists' Alley, their fan art would negatively impact Takaya's economic interests. When applying this factor, we must look at not only existing markets, but also potential markets the original artist may want to exploit. However, this is arguably unnecessary here: Takaya already sells derivative artwork of her characters in the marketplace, alongside copies of the original *Fruits*

---

<sup>336</sup> *Id.* at 588.

<sup>337</sup> *See generally* *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).

*Basket* manga.<sup>338</sup> The question is whether Blesseii's fan art would complement or substitute Takaya's artwork in the marketplace. Generally, the more transformative a secondary work, the less likely it is to substitute the original.<sup>339</sup> The court in *Kienitz* held that although substitutes are generally impermissible secondary works, complements are generally permissible.<sup>340</sup>

As noted under the first factor, Blesseii's depiction of Tohru Honda is highly transformative. Any fan of the *Fruits Basket* franchise would look at Blesseii's artwork and instantly identify it as a fan-made rendition of Takaya's character. No reasonable *Fruits Basket* fan would assume that Takaya has suddenly decided to start drawing Honda in this cutesy, more cartoonish style and selling copies of this art to fans; manga artists are not known to change their art styles so drastically. Because no reasonable fan would mistakenly purchase Blesseii's art thinking it was drawn by Takaya, there is no substitution. Rather, Blesseii's fan art arguably complements Takaya's artwork in the marketplace. Transformative fan art gives consumers more options as to how they can express their love for their favorite series. The sale of fan art gives consumers access to tons of unofficial merchandise that they can now purchase alongside officially licensed merchandise. There is a chance, of course, that a consumer may decide to avoid officially licensed artwork entirely and solely purchase fan art, and some may argue that this is a form of substitution. But keep in mind the ultimate goal of the IP Clause: "to promote the progress of science and useful arts."<sup>341</sup> Part of accomplishing this goal is encouraging the creation of new works. Takaya, and other artists in her position, still hold the right to create derivative works, a right that Takaya exercised when she published her artbook of *Fruits Basket* characters. The sale of fan art at anime conventions does not diminish this right. Rather, fan art adds diversity and visibility to the anime and manga industries when sold alongside official artwork. Transformative fan art helps the industries grow as a whole because it encourages fan engagement, consumption, and

---

<sup>338</sup> TAKAYA, *supra* note 21.

<sup>339</sup> *See, e.g., Campbell*, 510 U.S. at 591; *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9th Cir. 2007).

<sup>340</sup> *Kienitz v. Sconnie Nation, LLC*, 766 F.3d 756, 758 (7th Cir. 2014).

<sup>341</sup> U.S. CONST. art. 1 § 8, cl. 8.

recognition of anime and manga as prevalent facets of the American economy. So long as commercial fan art remains transformative enough that it does not replace officially licensed artwork—but rather works alongside licensed artwork to increase recognition of the anime and manga industries—the fourth factor should weigh in favor of the fan artist. After analyzing and weighing all four factors, Blesseii’s artwork should be protected under the fair use defense due to its transformative nature, limited borrowing from Takaya’s original expression, and unlikeliness to substitute Takaya’s artwork in the marketplace.

#### CONCLUSION

Anime and manga have become important industries within the American economy. The best way to encourage the growth of these industries is to encourage fan engagement without sacrificing the authors’ ability to profit off their original works. As is evident from the *Fruits Basket* example, the sale of commercial fan art has not threatened Natsuki Takaya’s economic interests. Rather, Takaya is still able to profit off her intellectual property, such as through sales of her artbook, while fans simultaneously profit off their own creative pieces. If anything, one could speculate that without high levels of fan engagement, *Fruits Basket* would never have been able to get a second anime adaptation. Similar to how the doujinshi industry complements the manga industry in Japan, transformative commercial fan art that utilizes a different art style from the original manga artist’s works in the marketplace does not substitute or threaten official artwork, but rather works alongside it to help the anime and manga industries grow as a whole.